THE ENGLISH LAWYER.

DESCRIBING

A Method for the managing of the Lawes of this Land.

And expreſſing the beſt qualities requiſite in the { *Student* / *Practizer* / *Judges* and *Fathers* } of the ſame.

Written by the Reverend and Learned Sir IOHN DODERIDGE Knight, one of the Iuſtices of the Kings Bench, lately deceaſed.

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M DC XXXI.

THE ENGLISH LAWYER.

The Printers to the Reader.

THE later part of this Volume was heretofore obſcurely printed by an imperfect Copie from a then unknowne Authour, under the Title of *The Lawyers light*: We now reimprint it in faire light, by the Authors owne Copie, written (for the moſt part) with his owne hand; wee vouch his name and intitle it, as hee himſelfe did, *The Engliſh Lawyer*: The other part hereof, which was not formerly printed, wee now alſo put forth according to the Authors owne Copie, and place it, as hee did, in the formoſt

rancke; There are other parts alſo (which are expreſſed on the next leafe) requiſite to the making up of the whole intended worke; but becauſe they are not made, or not found as yet, they can bee but deſired untill ſome happie hand ſhall either finde or finiſh the reſt of this good worke, whoſe worth wil recommend it ſelfe upon the reading.

This

This Whole Treatise is divided into three Parts.

The first concerning the Student: And that also divided into three distinct Sections.

THE first Section containeth a disquisition with what Naturall gifts and faculties the Student of the Law ought to be furnished withall.

The second Section containeth what acquired Qualities are required in the Student as well touching the Vertues intellectuall, and the liberall Sciences, wherein the Student should be informed; and other Knowledges necessary for the rectifying of his understanding, as also touching the Morall vertues for direction of his Conversation.

The third Section containeth the best manner and Methode that may be used for the most delightfull and most usefull study of Law, and whereby most profit may be gotten in profoundnesse of Judgement in the knowledge of our English Lawes.

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The second Treatise touching the Counseller or Practizer of the Lawes, is also subdivided into three principall Parts or Sections.

THe First concerneth his Private Counsell given at home in his Chamber to his Client, which is one part of his duty Consulendo, *by way of Counsell.*

The Second Part or Section concerneth the drawing of Assurances and Conveiances, which are of sundry sorts; which is his dutie Cavendo, *by way of Caution.*

The Third Part or Section concerneth his Pleadings for his Client; And that is threefold: In point of Law: In Argument of Demurrers: In matter of fact, as in giving or delivering of Evidence. And the Patronage of Causes in Courts of equitie: all which are his duties Agendo, *by way of publike Action.*

In

In the Third Treatiſe concerning a *Iudge*, are contained theſe particulars, in two generall parts divided: firſt, his Preparation in his perſon, Secondly, his Practice.

IN his Preparation, or conſideration of his Perſon, the qualities required in an upright Iudge are theſe: firſt, that hee bee Religious, according to the Counſell of Iethro *unto* Moſes, *Provide men fearing God.* 2 Chron. 19.7. Exodus 18.21.22.23.

Secondly, They ought to bee men of Courage. Provide thee among all the People men of Courage. Deut. 1. 17.

Thirdly, They ought to be men of Integrity, Iuſt men, dealing truly: They ſhall be iuſt, if firſt they hate Covetouſneſſe, ſo will they not be corrupted, For rewards and gifts doe blinde the eyes of the wiſe; Exod. 23.8. Deut. 16. 19. Eccluſ. 20. 28. 2 Chron. 19.7. *Secondly, if they have no reſpect of perſons.* Lev. 19.15. Deut. 1.17. 2 Chron. 19.7. *Thirdly, if they be free from paſſions and perturbations of the minde, as anger, favour, deſire of revenge, &c.*

Fourthly, Iudges ought to be wiſe, men able to diſcerne circumſtances, and to foreknow the miſchiefes and inconveniences that may enſue of inconſiderate Iudgements. Deut. 1.13.

Fiftly, Iudges ought to be learned, eſpecially in the Lawes, Be ye learned that judge the earth.

The Second Part, which is the Practice of the Iudge, generally conſidered is twofold, firſt either Sedentary, in the Court wherein he ſitteth: or Itinerate, in the Circuite wherein he rideth.

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THE ENGLISH LAWYER.

Cap. I.

FOrasmuch as the Exercise of all such as enterprise the Profession, and doe intermeddle with the Knowledge of the Lawes of this Realme, consisteth, 1, either in the obtaining, study, or speculation thereof. 2, Or in the practice, prosecution, or direction. 3, Or in the full and finall decision and determination of causes therein called into question: behoovefull it were (as mee seemeth) for such as have already entertained a love to that faculty, and covet to contemplate with their inward eye the *expresse and perfect Image of an English Lawyer*, to view each of these in their particular charge and duty, and therewithall to consider what things were requisite, and what course were most convenient to be holden for the

better and more full accompliſhment of that which is, and muſt be expected. And as the perſons whom our ſpeech concerneth, and whoſe charge we have here briefely touched, are three in number, *The Student, the Practizer, and the Iudge:* (For as touching the Pronothory or Clark, and the Attorney, they are rather Miniſters to follow others, then Managers to direct:) So will the matters incident to every of their duties yeeld us a threefold Treatiſe, and give us large ſcope of Diſcourſe in the proſecuting of ſuch things as are requiſite and incident unto the ſame.

And firſt as touching the *Student*, & his ſpeculative ſearch of our Engliſh Laws (w^ch^ is his indeavour and ſtudy) as it is in *order formoſt*, and by Nature the ground of the proceedings of both the other, being that indeed without the which the reſt cannot ſubſiſt. *Reaſon* in this point requireth, that due conſideration, and carefull forethought ſhould be had for the obtaining and triall of thoſe things which are eſteemed as *Viatica neceſſaria*, needfull implements behoovefull in the perſon of him that ſhall undertake to deale therewith. *Authors* which have written Inſtitutions for the better information and direction of the learner, have required at the hands of ſuch their Auditors and followers as were to be inſtructed; theſe three things, *Nature*, *Arte*, and *Exerciſe* or *Vſe*, each of w^ch^ they would ſo have, & indeed ſo ought to be linked to other, that ſeldome hath bin found perfection in any one perſon in whom all theſe three have

have not bin conjoyn'd: For *Nature* (though of her ſelfe excellent) yet without *Art* or *Exerciſe* is as the Gold in the droſſe, or as the precious ſtone taken out of the bowels of the earth, rude, and unpoliſhed: *Art* without *Nature*, bare, barren, and defective (as being indeed nothing elſe but an obſervation of *Nature*) And both without *Exerciſe*, voide of fruit: *Nature* reſembleth the ſoile; *Arte* or *Method* whereby wee are directed, the Huſbandman; *Precepts* or *Inſtitutions* in the Science which we meane to profeſſe, are as the ſeeds, which induſtry and exerciſe doe bring unto growth, ripenes & perfection: ſo that *Sane Beatus, dijsſ, acceptus eſt, cui Deus iſta omnia tribuit.* But ſithence that diviſion wch conſiſteth of two parts is holden moſt Artificiall, all theſe three (as me ſeemeth) may aptly be drawne and reduced into two originall Branches. The one concerning the *Qualities* wherewith it is convenient our Student ſhould be adorned before his intended enterpriſe attempted, and with the which he might be ready furniſhed to ſet upon the ſame. The other diſcovering the manner, method, and direction of the courſe of our ſtudy once entred, the meanes of furtherance thereof, and how, and in what manner to hold on therein without intermiſſion untill the wiſhed fruit, and expected end ſhall bee obtained. 1 2

In the former we ſhall include *Nature* and ſuch other habiliments as ſhall bee required for the full furniſhing and adorning thereof. 1

In the latter, *Arte*, *Exerciſe*, and other inci- 2

 dents

dents and adherents unto the same.

Concerning therefore the consideration of those former qualities that are to be before had, and obtained, *Philosophers* led by the rule of reason have distinguished the transitory gifts that God hath bestowed on us in this life, to be either *Bona animi, bona corporis*, or *bona fortunæ*. *Qualities* either resident in us, or externall benefits bestowed upon us. Those which are *inherent in us*, concerne either our mindes or our bodies, which good gifts of our mindes are either *Naturall* given by God unto us, without our labour bred together with us, and within us from our Cradles, growing and increasing with our age, as first *sharpnesse, pregnancy*, and *dexterity of wit*: Secondly, *Sound* and *exquisite memory*: Thirdly, *ready, copious*, and sweet *deliverie of our words*. Or *gotten and gained by long industry* and travell, grown to a perfit habit, either first illuminating our knowledges, as the *Sciences Liberall*, and other the speculative vertues of the minde: Or else secondly directing our lives and conversations as *the vertues Morall reposed in our wills*.

Cap. II.

To discourse therefore of these particulars (I mean principally the gifts of the minde) in such order as is before specified. The first and chiefest *Naturall* gift

gift is *ſharpneſſe*, and *dexterity of wit*, the excellency whereof ſurpaſſing all praiſe, needeth no commendation, being the thing indeed without which nothing can be throughly ſifted as it ſhould bee, or ſufficiently ſet forth as it ought: but to ſpeake more particularly thereof, and for the purpoſe in hand, none can well denie that doe conſider the depth of knowledge repoſed in the Lawes of this Realme: none I ſay can deny, which doe conſider how many caſes of much conformity, and reſemblance doe daily happen, wherein nevertheleſſe dexterity of wit upon ſome circumſtance of matter, eſpieth a difference: None can deny, which doe conſider that many in the Patronage and defence of cauſes, are oftentimes preſſed upon the ſudden, preſently to reply to the adverſaries unexpected objections, (which effect *Promptneſſe* and *readineſſe of wit* onely worketh:) but that the excellency and dexterity thereof were almoſt alone ſufficient to make a ready and preſt Lawyer; for it behooveth the Lawyer with a quicke conceit to comprehend the cauſe of his Client once opened, throughly to underſtand the drifts of his Adverſaries reaſons at the firſt urged, readily both to invent, and fitly to apply his provided proofes and arguments to the point in queſtion: all which are the effects of an excellent wit, and with the which we doe ſo much deſire *our learned Lawyer* ſhould be adorned.

The conſideration therefore of wit, or of the light of humane underſtanding which Almighty God hath given unto man, whereby hee excelleth

all other living creatures, may bee considered of us by the view of two severall faculties, or sundry
1 operations of our minde; the one for distinction
2 sake may bee called *Apprehension*, and the other *Iudgement* (not that the minde is diverse, or manifold, but that these are the divers affections, and proper passions of one and the selfe same cause.)
1 The first is the quick, speedy, and lively vigour, the ready ability of our understanding, and as it were the hand by which our minde taketh hold of the knowledge of things proposed, being indeed the very same the Latines call *Ingenij acumen.*
2 The other (before called *Iudgement*) is the faculty whereby we doe as it were give sentence of the thing conceived, and censure our owne understanding concerning the same. And as unto the first may be attributed (as the true ensigne and peculiar qualitie thereof) *Sharpnesse*; So from the other, which is *Iudgement*, in like manner followeth (the proper qualitie wherewith it is invested) *Soundnesse*; of which it is evident (to speake briefly) that the one is the sharpnes of conceit, the other is the soundnesse of conceit; resembling and alluding to that *Philosophicall* distinction, *Intellectus agens*, and *intellectus passibilis, seu possibilis*. And as these operations of the minde are in duty severall; so are they for the most part sunderly and severally distributed by God unto men; not that the one can
* be wholly, and alone without the other, but that the excellency of the one is seldome setled, and contained in one person with the excellency of the other, whereof daily observation may yeeld abundant examples.

The

The Iudgement of *Plato* touching his two Diſciples, *Ariſtotle* and *Theophraſtus*, was grounded upon the diverſitie of their naturall gifts, in this reſpect the one ſurmounted in ſharpneſſe of underſtanding, namely *Ariſtotle*; The other (though that way inferiour) yet every way comparable in ſharpneſſe of *Iudgement*.

There lived at one time in the Common-weale of *Athens* two notable Orators, *Demoſthenes* and *Demades*: the one through his care, premeditation, and ſoundneſſe of *Iudgement*, by ſpeech to pleaſe the humour of the people, was a man renowned. The other, namely *Demades* for his quickneſſe of wit, and ready utterance upon the ſudden, moſt excellent.

There were likewiſe wont to come into the Counſell Chamber of the ſaid City, at one the ſelfe-ſame ſeaſon, two famous Counſellors, *Ariſtides* for his ſound counſell greatly eſteemed, and *Themiſtocles* for his ſharpe and witty policies highly regarded. At one time there were in the field two famous Captaines, each againſt other in a quarrell, which concerned either the flouriſhing, or the downfall of both their States and Common-weales, *Hannibal* the *Carthaginian*, and *Quintus Fabius Maximus* the *Roman*, in which their conflicts the *Carthaginian* was not more commended for inventing a Stratagem, wherein he excelled, then was the *Roman* reverenced for ſtaid and adviſed *Iudgement* in preventing the ſame, wherein he ſurpaſſed: The one of them was not more wilely, then the other wary

ry; But thus much of the Heathen. In the Church of God, and as concerning the writings of ancient Latine *Doctors*, there is found in the ſtile of *Auguſtine* an excellent and peculiar ſharpneſſe: In the books of *Ambroſe* & *Ierome* a plain, full, and familiar ſoundneſſe, and *Bernard* addeth to both a delectable ſweetneſſe. Among the Schoolemen, who racked reaſon as farre as it would reach, one man in one age for his ſharpneſſe of wit was called *Subtilis Doctor*; and another neere the ſame time for his ſoundneſſe of *Iudgement*, *Doctor Angelicus*. But to come to the Lawes of the Land, and to exẽplifie our diſcourſe in our owne faculty (purpoſely refraining to ſpeake or publiſh the excellent gifts of many famous men now living in this profeſſion) let us call to our conſiderations two notable Ornaments of one Bench or Court, of one time, of reverend remembrance, and now both deceaſed, *Sr Anthony Browne*, and *Sr Iames Dyer* Knights: both having beene Chiefe in their places of *Iuſtice*. In the one did ſhine an incomparable ſharpneſſe of wit, and in the other was found in a manner an irrefragrable ſoundneſſe of *Iudgement*. But to leave examples, and to deſcend to a ſubdiviſion, we are to note, that ſharpneſſe of wit is againe obſerved by two properties, that is to ſay, *Quickneſſe of capacity*, and *readineſſe of diſcourſe*, for *Ingenij acumen non ſolùm concipit, ſed diſcutit*. And yet theſe qualities are likewiſe by God oftentimes ſunderly diſpoſed; for ſome men there are which can of themſelves ſoone conceive any difficulty by others propoſed in ſpeech or writing,

ning; but they are not alſo indowed with the naturall gift of promptneſſe of diſcourſe and argument; And, ſome others on the contrary are excellently gifted for Oratory or diſcuſſion, but defective, and come farre ſhort of others in the former property, I meane, in mentall conception.

And yet though a Student of the Law bee by nature unfurniſhed with theſe gifts of the minde aforeſaid, he muſt not be diſheartened, but rather incouraged; which incouragement may take good ground;

Firſt, upon conſideration with himſelfe, that ſeldome is ſeene ſuch excellency of quick capacity in any one perſon unmated with the blemiſh of ranging lightneſſe and inſtabilitie: That the more fertile the ſoyle is, the more prone it is to beare and bring forth (without painefull manurance) unprofitable, and ſometime moſt noyſome weeds; that as waxe is apt to receive whatſoever impreſſion, ſo is it apt eaſily againe to looſe it, and to be new framed into whatſoever faſhion; where on the contrary part the form which is engraven in Marble is as hardly worne out as it was with much labour imprinted: for quicke wits (ſaith one) are apt to take, unapt to keepe, ſoone hot, ſoone cold, more apt to enter ſpeedily, then able to pierce farre, like edges of ſharpe tooles, ſoone turned; For we may finde true by experience, that among a number of quicke wits in youth, few be found in the end either very fortunate for themſelves, or very profitable to ſerve

the Common-wealth; such was *Hermogenes* the *Rhetoritian*, who (as it is written) being in manner a Child but eighteene yeares old, compiled an excellent Treatise of *Rhetorique* savouring more of *Iudgement* then is commonly found in that age; but afterward attaining to the yeares of 28. hee became madd and utterly forgot all things.

Secondly, the mindes of Students are incouraged, and their wits consequently increased, as well by due commendation given them for their good endeavours, as also by commemoration of the utility, profit, and excellency of the things they covet to obtaine. Touching the first of these well saith *Aristotle*, *Adolescentium gloria studio duci*. Wherefore to be short, and to speake of this in a word, what a spurre Praise is to pricke forth the minde in every good attempt, is seene and perceived even in bruit beasts. The Hound hunteth best when he is incouraged with the cry of the Huntsman; that Hauke is made more eager to pursue her prey, to whom the Faulkner hath used to impart some part of the prey taken: But what course or tenor ought to bee holden herein, *Plutarch* giveth good instruction: *Cum exultant animi, reprehensionibus ad pudorem redigantur; cum dejecti sunt, rursus laudibus erigantur.*

Touching the second, which is the commemoration of the thing coveted; true it is, that the consideration of the excellency thereof is a most wonderfull provocation to set forwards the due meanes with all industry which serve for the obtaining

taining of the ſame, which for as much as in the tract we have in hand, is the exact knowledge of the Law, a briefe narration of the neceſſity and utility thereof is able ſufficiently to vanquiſh all tedioufneſſe of ſtudy, and all irkſomeneſſe to be endured and borne in the obtaining thereof: So that although (by the way, and nothing out of the way) apt occaſion be here offered to ſpeake in the commendation of the Law, ſurpaſſing all praiſe that my poore ability can beſtow upon it, yet let it ſuffice ſomewhat to have ſaid herein, and nevertheleſſe no more than another hath ſpoken in the like kinde many hundred yeares agoe; *Iuriſprudentia ſine controverſia, & magna eſt, & late patet, & ad multos pertinet, & ſumme in honore ſemper fuit, & clariſſimi Cives ei ſtudio, & ſemper præfuerunt, & etiam hodiè præſunt.*

Cap. III.

THe next naturall gift to be considered of, is *Soundnesse of Memory*, which is the receptacle wherin is reposed and laid up whatsoever thing the Vnderstanding hath apprehended and judged worthy of receipt or entertainment: for what doth it profit with great labour, dexterity, and industry to get together, when the thing gotten is not carefully kept and preserved, but loosely let goe, or negligently lost? What booteth it to reade much, which is wearinesse to the flesh; to meditate often, which is a burthen to the minde; to learne daily with encrease of knowledge, when as the matter learned is to seeke, at that time especially when we have most need of the use thereof? *Memory* therefore is the Chest of an inestimable treasure, given from God for the preservation of all kinde of knowledge: it is as *Plutarch* saith, the store-house of all our understanding; and as *Plato* saith, *Mater Musarum*, the Mother of the

the Muſes: as *Ariſtotle* ſaith, it is the guide of our experience, and the ground-worke of all our wiſedome, for that fore-paſſed experiences called to remembrance doe ingender adviſed circumſpection, and are able to direct all our future atchievements through the conſideration of fore-paſſed events. *Tully* ſaith it is *Signatarum rerum in mente veſtigium*, the character of things imprinted in our minde. S. *Auguſtine* (as it ſeemeth) raviſhed with the contemplation of this wonderfull faculty, uſeth theſe words thereof, *Omnia recipit recolenda cum opus eſt, & retractanda grandis memoriæ receſſus, ac neſcio quid ſecreti, atque ineffabilis ſinus ejus, cum omnia ſuis quæq; foribus intrant ad eam, & in eam reponuntur:* Memory is a ſtore-houſe infinitely capable, and can never be overfilled, wherein by the moſt cunning Work-maſter of Nature are hoorded up all kindes of acts and accidents that either the outward ſenſes have perceived, or the inward underſtanding conceived; wherein things of like kinde and quality, as in a large treaſury, are orderly compoſed and laid up together by themſelves in certaine, ſure, and ſepoſed cells, from thence to be drawne and deduced whereſoever fit and apt occaſion is offered; which Art of Memory doth manifeſt by this or the like inſtances enſuing: for when wee doe call to minde any one particular, the ſame ſo remembred doth for the moſt part bring to light his like, ſo that wee doe remember the one by the commemoration oftentimes of the other: of the which one hath

written very well in this manner; *In memoria omnia ita collocata & ordinata sunt, ut unumquodque seperatim, & cuncta confertim, & singula ordinatim exposcere & digerere valeamus.* The truth is, that some things there are which we can remember easily and with great facility, some other things with more difficulty, as hoorded up in the bottome of that Chest, and doe require more search (as the rumaging of wares in the bulke of a ship) to be unladen and brought to light; some things doe offer themselves, and some other things after long seeking are hardly found: And thus much may here suffice to have been written concerning the effects of humane Memory.

But for the better and deeper discovery of the nature thereof, (for then we shall the better addresse our selves to the use of Memory, when we doe truly comprehend the kindes, causes, and nature of the same) we are to conceive that the learned who have written hereof have observed a double faculty of Memory; the one concerning things comprehended by the outward senses, and therefore called by them Memory Sensative: The other concerning things conceived by the Vnderstanding and Power of wit, and therefore called Intellective Memory. The first, namely Sensative Memory is common to Man and many other living Creatures, resulting from the sense: Hence it is that the Horse knoweth and remembreth the way wherein hee hath beene often travailed,

vailed, many times better then his Rider; The Dog after many yeares abſence can call to memory his Maſter, and by fawning upon him renue his old acquaintance: The fowles of the ayre, how farre ſo ever they flie can readily returne to their Neſts, by Memory of the place where their young are repoſed: The Bee can reſort to his owne Hive, and in the Hive to his proper hole; and the little Ant retire to her Denne whence ſhe firſt iſſued, neither forgoing nor forgetting it at her returne, with innumerable occurrences of like nature, all which are effected by the Art and operation of Memory Senſative.

Memory Intellective followeth the uſe of reaſõ and therefore is found in no other Creature then Man, which is indued with the faculty of reaſon. And whether, and in what manner this kinde of Memory doth differ from the Vnderſtanding it ſelfe, I doe remit to the Philoſophers, to the contemplation of whoſe learned diſcourſes I doe commit the curious deſire of the Reader that ſeeketh farther ſatisfaction herein.

But to proceed: as there is a twofold Memory, Senſative and Intellective, as hath beene ſaid, ſo is there alſo a double operation of the Memory Intellective: The one is called *Actus memorandi*, the other *Actus reminiſcendi*. The firſt of theſe is the repreſentation of things paſt, as if they were ſtill preſent, repreſenting the Image of things forepaſſed in the ſame manner as if they were

now

now actually & really present. *Actus reminiscendi* is as it were a kinde of discourse of Memory; for as before was said of understanding, that there is one operation to conceive and comprehend, and another operation to inferre, collect and discourse thereupon, and to draw conclusions from a thing conceived to another thing concealed, and to extract out of things knowne the knowledge of things unknowne; so is it likewise in these operations of Memory, the one doth remember the other, *viz*. *Actus reminiscendi*, out of one thing remembred discovereth another thing in manner lost and forgotten: so that the one draweth the other as the severall linkes of a Chaine draw and depend one upon another: Examples will make it manifest. If a man doe relate unto me a matter done in time forepassed in his and my presence, and with our privities, if I doe remember the same, and thereby doe acknowledge the thing to be true, for that the same is now represented unto me by the Act of Memory, as if it were really present, this is called *Actus memorandi*: But if I have forgotten it, and he bring me in minde of it by quickning and reviving my Memory by the circumstances of time, place, company, or such like other occurrences, and by that meanes at length I come to repaire that decay of Memory, this is called *Actus reminiscendi*; so that the last mentioned operation may aptly bee called the Discourse of Memory.

The

The objects of *Memory* are things passed, as *Aristotle* recounteth, *Memoria est rerum præteritarum.* And as hope is of things to come, sense and understanding of things that are present; so *Memorie* is employed and worketh upon things past: And thus much shortly by the way of a *Philosophicall* discourse (*rudi Minerva*) touching *Memorie*. *Objects of Memory.*

Now that out of these things thus knowne we may make some use for the better establishing and encrease of the students Memory, and to teach as it were a true Art Memorative, not out of forraigne precepts, or by the helpe of Imaginary places, but out of the nature of Memory it selfe, which may be *tanquam vivida præcepta*; I shall exhibite to your consideration some few remarkeable circumstances, and so much the rather, by how much the more this facultie (although excellent in it selfe) yet is the sooner lost, and with the losse thereof, it maketh all our studies but lost labours. For true it it is, and too true which *Seneca* affirmeth, speaking of Memory, *Res est ex omnibus partibus animi maximè delicata, & fragilis, in quam primum senectus incurrit*: The most delicate and fraile part of our Minde, the which old Age doth first assault. And as *Pliny* saith, *Nec quicquam aquè fragile in hominum vita, morborum & casus injurias, atq; etiam metus sentiens*; Nothing so fading in all Mans life, subject to decay by the injuries of sickneſle, chances and feares: therefore for the better accomplishment of our intended purposes; let us first consider the instrument or

organ, which the qualities or faculties of the mind or ſoule do worke withall in this life, which is the body; for the body is *vehiculum animæ*, the chariot, wagon, or ſhip of the ſoule, if not the ſepulchre thereof, as *Plato* affirmed, σωμα ὀν τῆς ψυχῆς σημα, and the aptneſſe of the inſtrument is a great furtherance to the facility of the workmanſhip, and to the beauty of the worke. Mans body being compoſed of elementall qualities requireth in the perfection thereof a temperature of humors, which alſo conſiſteth in the temperate diſpoſition of heate and moiſture, for that *in humido, & calido conſiſtit vita*, and hereby it is made a more apt inſtrument and organ for the operation of the powers of the ſoule, and ſo conſequently of Memorie, naturall moiſture muſt not abound as in children, whoſe memory is therefore in tender yeeres moſt commonly not of the beſt. And againe, naturall moiſture muſt not on the other ſide be almoſt in a manner exhauſted, as in old men, whoſe Memorie is therefore worne, but it muſt hold the golden meane, for fluide things are apt to receive but cannot long retaine any impreſſion, by reaſon of overmuch moiſture, which makes the impreſſion looſe, and at length utterly loſt; And aride and dry things can receive no impreſſion for want of moiſture, the one receiveth but retaineth not, the other receiveth not at all; wherefore as this golden meane muſt be preſerved in the temperature of moiſture, ſo muſt it bee held indifferent betweene cold and heat, nothing ſo hurtfull to *Memory* as overmuch cold, nothing more harmful

to

to *Memory* then overmuch heate, the which how to mitigate in the diſpoſition of the body I leave to Phyſitians by medicine and diet; and therefore I reſort to precepts agreeable and correſpondent to the nature of Memory without medicine.

Firſt therefore, whoſoever deſireth to remember that ſcience, facultie or propoſition which he learneth or readeth, let him bee well aſſured that he firſt throughly underſtand and apprehend the ſame with ſome kinde of delight, for no man did ever remember that perfectly, which hee underſtood not throughly; in as much as the well underſtanding is the Character, and ſeale of the thing underſtood, which the Memory receiveth imprinted in her. Things are then ſaid to bee throughly underſtood, when the effects are known by their cauſe, *tùm enim ſcimus, cùm per cauſas cognoſcimus*, as ſaith *Ariſtotle*; or when the cauſe is known by the effects, when the reaſons thereof are throughly apprehended, and the conſequents truly diſcerned, namely, when the judiciall part of our underſtanding reſteth ſatisfied, and giveth a ſentence within our ſelfe, that it doth fully comprehend. This perfect underſtanding muſt bee joyned (as I ſaid) with delight, which dilateth the vitall ſpirits, and quickneth Memory; whereas things conceived in contrary paſſions can hardly be retained long through the perturbations occaſioned therby.

Vnderſtanding with delight is drawne from the excellency of the knowledge apprehended, from the rareneſſe, ſtrangeneſſe, or elſe of the

good conformitie and coherence thereof, with other things, or out of a naturall inclination wee have thereunto; For it is true, *Quæ magnâ æstimamus magis memoriæ infigimus*, therefore first covet to understand well and with delight, and you shall remember the better.

2 The next precept is, often to meditate upon the thing so understood with a diligent disquisition and search through all the parts thereof, for whatsoever is by perfect understãding imprinted in the Memory, the same is more deeply ingraven by meditation therein; and as spice swallowed doth neither give taste to the tongue, nor heat to the stomacke, but when it is first broken and chewed in the mouth; so, much reading doth not increase learning except it be whetted and sharpned with meditation, which is the chewing of the cud after the mindes repast. And hereof it is that *Aristotle* affirmeth that *Meditatio confirmat memoriam*, and hence springeth the Proverbe, that it hath beene seldome seene that ever an old man forgot that place where hee had hidden his gold, for where our treasure is, there is our heart and meditation also.

3 The third consideration is to use and keepe a method, and to analyze the matter with all his parts and incidents which wee doe desire to remember, a course which notably establisheth, confirmeth, and strengthneth Memory. For in as much as Method consisteth much of division, that saying is very true which the glosse hath observed, and *Bracton* out of the same transumed,

Divisio

Diuiſio ſive partitio triplicem operatur effectum; primò enim animum legentis incitat, ſecundo mentem intelligentiæ præparat, & tertiò memoriam artificiosè reformat.

The fourth conſideration or precept is, to eſchew and avoyd the troubling and incumbring the Minde at one time with ſundry different and uncohærent matters, except it be done with much moderation, and at ſet times and houres, for recreation onely, and for the reviving of our underſtanding with variety, when it beginneth otherwiſe to be weakned, dulled or cloyed: ſo ſhall our Memory not bee peſtered with manifold impreſſions; for when it ſeeketh to apprehend the one, it often and moſt commonly doth loſe the other, according to the uſuall and true ſaying, 4

Plurimis intentus minus eſt ad ſingula ſenſus.

The fift precept is daily to exerciſe Memory, that is, daily to commit things to the faithfull cuſtody of our Memory, and after a time paſſed, moſt curiouſly and carefully to recall the ſame to an account thereof, and to render backe againe the things ſo received. And this kind of exerciſe maketh Memory very ready, and doth much increaſe the ſame; For *Quintilian* hath very well noted of Memory, that *Nihil æquè augetur cura, vel negligentia intercidit*; Nothing is ſo much encreaſed by diligence and care had thereof as Memory, and then the ſame nothing ſooner loſt by negligence thereof. As touching a true uſe hereof, we are to conſider a diſtinction of things to bee remembred; for either we doe deſire to remem- 5

ber the matter or ſubſtance onely which in all kinde of learning is to be obſerved, or elſe we alſo deſire to commit to Memory the frame and compact of the words alſo, as when we doe covet a penned Oration, ſet Sermon or Speech.

As touching the firſt, as the morning is a fit time to ſtudy, ſo is it alſo to commit matters of ſubſtance to Memory; for as the Memory is ſaid to be *Muſarum Mater*, ſo is *Aurora Muſarum amica*, for then are our bodies diſcharged of all ſuperfluous burthens that may hinder our ſtudies and meditations, and our ſpirits are more quicke after their received reſt.

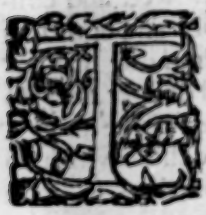
As concerning the ſecond, many doe not unfruitfully commit their penned orations, ſet ſpeeches, laboured Sermons, and ſuch like which they covet verbally to pronounce, to Memory in the evening, being ſilent and quiet, and to give it harbour and lodging with them overnight, that they may more readily recount the ſame in the morning. And thus much touching theſe few, ſhort, eaſie and familiar precepts and obſervations touching that operation which we have called *Actus Memorandi*.

Now as touching the other called *Actus reminiſcendi*, the ſame is incited by divers circumſtances, as of the place, whereof *Ariſtotle* ſaith, *à locis videntur reminiſci aliquando*; So likewiſe of the perſons, times, the manner of doing, or as ſome other memorable accidents ſubject to the ſenſe, not ordinary or accuſtomed, doe occaſion: for things ſtrange and unfrequented are beſt held in

Memory

Memory, because they were first received of the Memory with admiration, as a new welcome gueſt into an Inne or lodging, about the entertainment and good uſage of whom there is ordinarily moſt care and induſtry beſtowed and conferred; And therefore no doubt, and upon this reaſon, thoſe things which children doe firſt apprehend with an admiration and delight, they do retaine beſt and hold when they come to age. To theſe conſiderations there are thoſe which do adde the precepts of Art Memorative, ſo often treated of by ſuch as have written of Oratory, by appointing certaine places, conceived and imagined unto themſelves, which being carefully diſpoſed in convenient order, they doe fixe thereupon thoſe things which they would remember in apprehenſion, and by conſideration thereof do call to minde ſuch forepaſſed matters in due and direct order, and ſo with much facility doe and can recount the ſame, upon which places ſo in their imagination fixed and apt for the matter in hand, it behooveth that they caſt their carefull conſideration and frequent meditation.

Cap. IIII.



He third gift given from God by the course of nature unto Mankinde, wherewith the Student of the Lawes ought to be adorned, is a prompt and ready delivery by way of speech, of those things which are conceived in the minde, which is as it were the hand that doth communicate the former gifts spoken of, and participate unto others; and is that which the excellent Romane Oratour affirmeth to bee *bene constituta Civitatis quasi Alumna quadam*, I meane not an elaborate curiosity of words, or an affectation of phrase, which is practised by none, and wherewith none are mooved, but such as are of vulgar judgement. But that I meane which the same Author commendeth, *Ea dicendi facultas quæ est plena dignitatis, grandis verbis, sapiens sententijs, accommodata causæ, genere toto gravis:* for of him that is adorned therewith saith he, *hujus enim est in dando consilio de maximis rebus cum dignitate explicata sententia, ejusdem etiam languentis populi incitatio & effrenati moderatio:* That kinde of eloquence which is full of dignity, ever worth hearing, in speech pure without affectation, sententious and discreet, apt, answerable and agreeable to the matter in hand, and throughout beautified with

with gravity: Of this required quality let us also consider some advertisements (as we have done of the former).

Eloquution doth consist of three things, first, of the voyce as the instrument, 2, the words that are the subject; 3, the manner of doing, which is the forme of delivery. In the voyce are required two principall qualities, soundnesse and sweetnes: this thing the same Oratour expresseth thus, *Cum orationis judicem vocem habeamus, in voce autem duo sequamur, ut clara sit, ut suavis sit, utrumq; omnino à natura petendum est, verum alterum exercitatio augebit, alterum imitatio praesse loquentium & leviter: litteræ neq; oppressa sint ne aut obscurum, neque nimium expressa ut putidum:* In the words two things are required, purity and propertie; *Eloquution.*

First purity, that is, that neither the words bee old or outworne, neither newfangled or affected, in the which *non solum rusticam asperitatem, sed etiam peregrinam insolentiam fugere discamus*, that we may learne to eschew not onely forlorne rusticity, but all new affected outlandish vanity. 1

Secondly, property, that is, they are to bee made apt for the matter in hand, having few translations, Metaphors or borrowed speeches, but where they are needfull and doe illustrate. 2

In the third, the manner of composition of the speech and delivery, there are also two things considerable; first, perpetuity, secondly, exornation. 3

Our speech is made perspicuous if our words and sentences be not doubtfull in the compositiõ,

if they be free from Amphibology and ambiguous reference, if they be cleere of idle Tautology and vaine repetition, if our periods and clauses be not over long, nor interlaced with too many Parentheses; Lastly, if the copiousnesse and superabundance of words unnecessary hinder not the apprehension of the hearer, a fault whereinto many fall, that nevertheleſſe doe thinke they doe exceeding well.

3 Secondly, exornation is to bee performed by amplifications, extenuations, and such other Rhetoricall precepts as that Art teacheth, unto the which for this point I doe referre you; onely here giving you this caution, that the exornation exceed not the quality of the cause, *ne materiam superet opus*, for as it is vaine to overguilde excellent Marble with gold, so gold beseemeth not everie material; And many things shall and must passe the Lawyers pen and speech, which are *secunda mutandi reperiri vana sed vanum evitare docti*. And having thus much said of these three gifts which proceed from God by the gift of nature, I will conclude with that saying of *Tully* which doth comprehend all three, *Animi & ingenij eclares quidem motus esse debent, qui ad excogitandum acuti, ad explicandum ornandumq; fint uberes, & ad memoriam firmi & diuturni.*

CAP.

Cap. V.

THus with as convenient brevitie and perspicuity as I could have I declared those natural abilities that I wish him that shall undertake the study of the Law to bee furnished withall. There doth now farther remaine a consideration of those qualities that are acquired by industry, and not ingrafted by nature, wherewith it will (doubtlesse) be behoovfull also, that our student should be adorned. Those acquired qualities whereof I speake, are of two sorts, some of them perfecting our understanding, and inriching our knowledge, and others rectifying our wills, and directing our behaviours and manners. Of the first kinde are the *Vertues Intellectuall*. Of the second sort are the *Vertues Morall*.

First of all therefore let us speake in order of those *Intellectuall Vertues*; And let us a little fall into dispute, whether any other knowledge bee needfull for a Lawyer, save onely that of his selfe profession, I meane the knowledge of the Law; And if there be any of those *Intellectuall* endowments necessary, Then, which and how many of them are needfull, and in what sense, measure and

understanding they bee conceived and adjudged so to be behoovefull.

Ob. prima. Some men there are which thinke that a Lawyer should not need much to bee troubled with any other learning then that which is their owne, whose reasons and motives thereunto, let us propose and thorowly weigh and examine the same, so that as well such as are of the one part, as of the contrary, may be thereby the better called into consideration.

Ra. prima ab experientia. Their first reason is drawne from experience, for it hath often hapned and appeared in every age (say they) that there have beene many excellent Lawyers within this land, of deepe judgement, great understanding, profound knowledge in their profession, of ready and ape eloquution, and yet no schollers at all; utterly ignorant of any other additionall erudition, then their homebred naturall gifts. These men have beene famous in their times, have undergone great affaires, as well in the Courts of our Soveraignes, as in the Tribunalls, wherein they have been worthily placed; and also generally in the greatest businesse of the Kingdome and Common wealth; so that the number of these men from time to time have not beene few. Therefore if the knowledge of the Law may be gotten without other learning, what need then to bestow time in the obtaining of those Arts, when as the Grammer Schoole yeeldeth as apt Plaints for this profession, as the Vniversity.

Ra. secunda ab subjecto juris. Secondly, they say that the knowledge of the

Law is affirmed to be *Rerum divinarum humanarumque Scientia*, it doth containe the knowledge of all divine & humane things; & therfore he that hath obtained that knowledge, hath therein compriſed, included, and contained all other knowledges, and need not to buſie himſelfe farther with the ſearch of any other, as having obtained the knowledge of the Law, which is truly ſtiled The Science of Sciences; for the knowledge of the Law is as large, and as ample as the materiall ſubject, and the matters and cauſes whereof it treateth, whereof contention or ſtrife may grow, or upon which they may bee grounded: for the end and finall ſcope of the Law is, *ut ſopiantur jurgia*; ſo ample is this ſubject, as all thoſe things whereof men may have property or poſſeſſion, or whereupon or concerning which injuries and wrongs may be offered or inferred.

Thirdly, they ſay that we ſhould conſider, that *Ars eſt longa, vita brevis*, the ſtudy of the Law is, *multorum annorum opus*, it is the worke of many yeares, the attaining whereof will waſte the greateſt part of the verdour and vigour of our youth, and therefore the ſooner we doe apply our ſelves unto the ſtudy of the Law, it will be the better for our eaſe; for in a long journey, hee that hath found out the ſhorteſt way, with much eaſe and in leſſe time commeth to his journeyes end. And to conclude with the Orators words; *Is autem concludatur in ijs quæ ſunt in uſu Civitatum vulgari ac forenſi, remotiſque cæteris ſtudijs quamvis ea ſint ampla atque præclara. In hoc unoſpere (ut ita dicam)* noctes

Ratio hujus ducitur à diuturnitate juris.

noctes atque dies urgeatur, (What hee saith of his Oratour, these men apply to the student of our Law) Let therefore our student of the Law be concluded and compassed within the bounds of his owne profession, and exercised in things of vulgar and ordinary use in civill causes, and all other forraigne studies being relinquished, let him bee night and day employed in this sole worke. These and the like are the allegations and arguments of those men that remove the knowledge of all forraigne Arts and Sciences liberall from the student of the Law.

But, what of the other part may be said, what reason may be produced and verified, and how these objections may be answered, let us observe; leaving all other particular enforcement to their proper and peculiar places.

Resp. ad primam object.

First therefore, that is very true which hath beene affirmed, Many excellent men there have beene, that by their gifts alone which nature hath bestowed upon them without other addition of Art or learning, have attained to a profound and deepe knowledge of the Lawes of this land. But to conclude thereof, that all other men may bee so exquisite by their example without farther helpe and furniture then their owne, were much like to him that would affirme, because some men by their strength have travailed a long journey on foot, therefore no other man for that purpose should need the helpe of an horse; But if those men of such naturall vigour in their foot-journey had led (as the Proverbiall speech is) their horse

in

in their hand, that is, had beene assisted with the helps of other learning, they had beene much more excellent, and attained that knowledge with more facility and certainty, for their gold oare comming out of their naturall Mine, and of their home-brood, was not sufficiently cleered of his drosse; Their speeches have wanted perspicuity and brevity, their arguments although deeply learned and full of excellent matter, yet have oftentimes beene tedious, confused and perplexed, and their opinions wavering and unsetled, and could not neatly, and expeditely deliver themselves; because some men are by nature skilfull Painters, Carvers, or excellent in any manuall occupation (as some there are) therefore none should be bound Apprentices to those trades were a wonderfull absurd allegation: Men are musicall by nature, many have good voyces which Art cannot yeeld, therefore artificall Musicke (which is the perfection of the naturall) should be banished, were a strange illatiō? Although a man may goe alone, yet he were unwise to refuse the helpe of a staffe where occasion required the use, and opportunity offered it selfe. It hath beene said by us in the former part where occasion was offered, that Art truly used is the perfection of nature; Art hath also naturall grounds, and was invented for Natures furtherance; For mans wisedome devised meanes out of frequent use and long experience, to ripen natures operations, by precepts; and precepts layd together have ingendered Arts. Men naturally

rally can number, yet they have deviſed many wayes, by cypher, by Counters, and by other formes to aſſiſt nature, and to deale with ſundry formes by the exerciſe of Arithmeticke, the Art of numbring, and to bring to paſſe ſtrange effects far beyond the ability, nay to the marvell and aſtoniſhment of men onely holpen by the power of nature. Surely ſometimes ſuch circumſtances have happened (if not often) to thoſe men of ſuch excellent gifts naturall without other learning, wherein they have for want of good literature ſo much beene miſ-led, that they have at unawares bewrayed themſelves, ignorant even in triviall things, and expoſed themſelves to no ſmall ſcorne and obloquy.

This hath beene anciently obſerved, and is obvious every day; but becauſe I will lance no new ſore, I will ſet downe what the Roman Oratour obſerved, ſpeaking of ſuch naturall excellent men of his time, let mee therefore uſe his words; *Quid ergo hoc fieri turpius aut dici poteſt, quam qui hanc perſonam ſuſceperit ut amicorum controverſias cauſaſque tueatur, laborantibus ſuccurrat, ægris mediatur, afflictos excitet, ita labi, ut alijs miſerandus, alijs irridendus eſſe videatur.* What can bee more unſeemly either to be done, or to be ſpoken, thē that he which ſuſtaineth & hath taken upon him that perſon, as to defend the cauſes and controverſies of his friends, to ſuccour the oppreſſed, to relieve the grieved, to raiſe the afflicted (which are the properties as well belonging to the Lawyer, as to the Oratour) ſo much in ſmall and triviall things

to

to erre and be deceived, that some should hold him worthy to bee pitied, and others make him the subject of dirision; And hence is it that in our owne times so farre this matter hath beene urged, that in scorne some have called the crew of unlearned Lawyers, *Doctum quoddam genus indoctorum hominum*: But to returne that reproach from whence it sprang, to the honour of the study of our Lawes be it spoken, that the Profession of our Lawes hath now, and formerly hath had great numbers of students that have had as long, and as ample institution in those sciences called liberall, as any of thē. And if I might remember old Originalls from the time of the *Norman Conquest*, untill the latter dayes of King *Henry* the third, as well the Iudges itinerate through the Counties, as those that were sedentarie in the Kings high Courts of Iustice (which then for the most part followed his person) were men excellently skilled in all generall good learning, as doe witnesse the works of that worthy Iudge *Henry de Bracton*, and *Iohn Britton* sometimes a learned Bishop of *Hereford*, skilfull in the Lawes of this Realme, who writ a treatise by commandement, and writ of King *Edward* the first, as an Institution to the study of the lawes of this Realme, serving that time. So also was *Martyn de Patchull* sometimes Deane of *Pauls* in *London*, of whom the said *Bracton* maketh honourable mention, together with divers other noted men of rare learning, not onely in the Lawes of this Realme, but in all forraine knowledge fit for their places. And these men exerci-

Henry de Bracton, Io: Britton Bish. of Hereford, Martin de Patchull Deane of Pauls.

sed judiciall functions in the Temporall Courts of this Realme, whereof our records being *& vetustatis & veritatis vestigia*, the lively representations of time and truth, and reputed the Treasures of the Kingdome, doe yeeld plentifull testimony. What should I farther commemorate the names, and revive the memories of our worthy Ancestors, *Herle, Bereford, Thorpe, Finden, Belknap*, flourishing in the victorious times of King *Edward* the third? Whose deepe, short, subtile, pithy and learned Law-arguments; argue moreover thus much, that they were sufficiently furnished in that Schoole-learning, which in those times was in most esteeme. Let me not here forget or passe-over in silence those excellent Iudges in the raigne of King *Henry* the sixt, *Newton, Prisott, Forteſcue*, which man last named, was first Chauncellor to the Prince, and after chiefe Iustice of the Kings Bench, and was excellently learned in Divinity, Philosophy, Law both Ecclesiasticall, and the Lawes of this Realme, as the little Treatise written by him in the praise of our Lawes, in the Latine tongue, and some other Manuscripts I have seene of his worke of a higher subject, doe evidently declare. But I will represse my selfe, resting in this place upon that which now is already spoken, leaving other particularities untill we come to determine of other peculiar Sciences.

Herle, Bereford, Thorpe, Finden, Belknapp tempore R. Ed. 3.

Newton, Prisot, Forteſcue, tempore H. 6.

Resp. ad sec. ob. To the second objection it may well bee affirmed, that the knowledge of the Law is truly stiled, *Rerum divinarum humanarumque Scientia*; and wor-

worthily imputed to be the Science of Sciences, and that therein lies hid the knowledge almoſt of every other learned ſcience: But yet I pray conſider, that thoſe forraine knowledges, are not inherent or inbred in the Lawes, but rather as a borrowed light not found there, but brought thither, and learned elſewhere by them that have adorned and poliſhed the ſtudies of the Lawes. For ſince the materiall ſubject of the Law is ſo ample (as indeed it is) containing all things that may be controverted. The ſtudy of the Lawes then muſt of neceſſity ſtretch out her hand, and crave to be holpen and aſſiſted almoſt of all other Sciences; Therefore this objection may well bee inverted againſt them that doe urge the ſame, and proveth rather that the Profeſſor of the Lawes ſhould be furniſhed with the knowledge of all good literature of moſt of the Sciences liberall; for if a man may obſerve the uſe of thoſe ſciences to lie hidden in the Law, who then may better uſe them or obſerve them, then he which is already furniſhed with them. And if the knowledge of the Law, doe receive ornament by thoſe eruditions (as I think no man can denie) it ſhall be very expedient and well befitting the ſtudent of the Lawes, to have firſt familiarity and acquaintance with them, and to bee inſtructed in the ſame.

But it may bee objected, that the Lawyer ſhall not need the knowledge of thoſe Arts himſelfe, but when opportunity ſhall be offered, and when queſtion ſhall ariſe, wherein the Lawyer ſhall

ſtand in need of reſolution of any of thoſe Sciences, he may conferre, and bee informed by the Profeſſors of the ſame, to his good ſatisfaction, although himſelfe be not expert therein. Many times there have beene (and may bee hereafter) Appeales of Mayme brought by ſuch parties as in private fight and otherwiſe by violence have received maime, that is, mutilation and loſſe of a member of his body ſerviceable for offence or defence againſt thoſe parties that ſo have hurt them, and many times queſtion & debate ariſeth, whether the hurt ſo received, be to bee adjudged a Maime, yea or no? So that the Iudges are oftentimes enforced to conferre with Chyrurgians for their ſuffrage and reſolution; will you therefore require your Iudges, Profeſſors and ſtudents of the Law to be alſo Surgeons, or skilfull in the Art of Chyrurgery? that were altogether uncomely.

Reſp. This objection is eaſily anſwered and avoyded, for firſt there is a great difference in this reſpect betweene mannall Arts and occupations wrought by the dexterity of the hand, and thoſe that are ſciences and vertues intellectuall adorning the Minde, as are the Liberall.

Mayme. The Lawes of this Realme doe appoint no other trial of a Maime, then the view of the Iudge, for a Mayme is ſuch as for the moſt part is viſible and ſubject unto ſenſe; And therefore if upon ſome doubt or occaſion conceived, by reaſon of the view, the Iudges doe deſire the conference of expert Chyrurgians for the better ſatisfaction

of

of their conſcience. This is no matter of neceſſity to import the Iudges, but matter of diſcretion onely, in not being too precipitate, but rather mature in their judgement, as they ought; and to ſhew themſelves rather willing to goe onward with others, then to run alone of themſelves. And herein the Iudges are not tyed to the opinion of the Chyrurgian, otherwiſe then hee findeth the ſame to be conformable and grounded upon ſuch good and apparent reaſon as may yeeld full ſatiſfaction and contentment: But when the queſtion ſhal be moved w^ch ſhal require informatiõ of any learned ſcience which is gotten by diſcourſe of reaſon; Although in thoſe caſes the laudable courſes have ever beene in our Courts of Iuſtice, to heare the Profeſſors of thoſe ſciences to diſpute and debate the matter controverted before our Tribunall and judgement ſeats, yet no man can deny, but it is better to draw one draught out of the pure fountaine it ſelfe, then to quench our thirſt out of derived ſtreames, for

Dulcius ex ipſo fonte bibuntur aquæ.

For in every Science which doth depend upon diſcourſe of reaſon, there are many fundamentall Maximes and Principalls not to bee changed in any future reſolution, but rather to be received as guides to direct, which at the firſt will ſeeme harſh to ſuch as have not beene inured unto them, and therefore it were perillous to the Iudge and Profeſſor of the Lawes, and he ſhall not bee able either to receive to himſelfe, or to give to others ſatisfaction, except hee can by his proper know-

ledge discerne of the controversie. For we surely know *Non ex relatis aliorum, sed cum per causas cognoscimus*, and if wee have knowledge in those sciences our selves, we shall the better apprehend and understand the reasons of those matters so disclosed by debate: And thus I leave the second objection.

Resp ad tertiam Object. To the third, last, and maine objection, this may be produced for an answer, that though true it bee *Vita brevis est, ars longa*, our life is short and full of calamities, and learning is a long time in getting, yet may wee not in respect of short life shut up all our endeavours for feare of an end; for therefore the Period of our life is sealed up from mans knowledge, first for that wee should bee alwayes ready when we are called hence; Secondly, for that the feare of a knowne death should not daunt or interrupt our endeavours; Likewise the verdure of our yonger yeares is best imploied and spent in obtaining of those sciences, for then are we most apt thereunto. And as the study and practice of Morall Philosophy (as Art doth witnesse) is not fittest for men over yong; so likewise the study of the Law which hath his foundatiō in Morall Philosophy (both having one end generall, namely, the rectifying of our manners) doth require some maturity of yeeres, and not to bee set upon by infants in yeeres, judgement, and cariage. And so likewise shall wee finde in a long journey, that the faireſt way is better although somewhat farther about, then a shorter rough way, hard to finde and difficult to keepe; and in the

the end alſo to anſwer that cloſe or upſhot drawn from *Tullies Orator*; I would you ſhould likewiſe remember for concluſion of this queſtion that which he affirmeth, *Non enim Cauſidicum neſcio quem, nec proclamatorem aut rabulam hoc ſermone noſtro conquirimus, ſed eum virum qui primùm ſit ejus Artis Antiſtes, &c.* We ſeeke not hereby to inſtitute I know not what manner of vulgar profeſſor of the Lawes, no common blatterer or temeriſt, but that man which may prove in the end an excellent and chiefe Pillar, Prop and Ornament of his profeſſion.

CAP. VI.

HAving hitherunto proceeded in the generall, it ſhall bee now requiſite to deſcend to particulars. And firſt of all to conſider, whether the knowledge of the Latine Tongue, and the uſe of Grammar, tending to the obtaining of the ſame, be neceſſary for a Lawyer: not propoſing it by way of doubt, queſtion, or difficulty, that it ſhould need any large diſpute, but by way of manifeſtation and diſquiſitiõ onely; for there is no man (as I ſuppoſe) that can or will deny, but that the knowledge of the Latine tongue is right neceſſary for our Engliſh Lawyer: which may be made apparent by many evident

The neceſſity of the Latine Tongue in a Student of the Law.

evident and eminent arguments and allegations, easily to be produced for that purpose.

Ra. prima. First of all, many of our old Statutes, and ancient positive Lawes were written and formed in the Latine tongue, and so doe still rest and remaine in our Records and Bookes; as that Act called *Magna Charta*, The great Charter of *England*, great indeed, not in respect of moulde, but matter, not great in quantity, but in weight and worth: Containing many the fundamentall points of our Lawes, bought with the blood of our Nobility and English Ancestors, in those troublesome times of King *Iohn*, and *Henry* his sonne. And although many of the Constitutions contained in that Charter, first introduced in part by King *Henry* the first, (then called for his learning *Henry le beu Clarke*,) comming in and putting by his elder brother *Robert* of *Normandy*, and as it were by restitution and renovation of the old Lawes of *Edward* the Confessor King before the Conquest, and in tract of time sought to be enfringed, yet nevertheless not without trouble it was afterward againboth revived & enlarged, first by another Charter of King *Iohn*, and lastly by King *Henry* the third his sonne in Parliament established, and sundry times afterwards by succeeding Parliaments, also confirmed and commanded to be put in due execution.

Magna Charta.

Hen. 1.

Stat. Marton 20. H. 3. Marlebridge Glouceſter. In like manner these severall Lawes of note, as the Statute made at *Marton Abbey* in *Surrey*: That also made at *Marlebridge*, that likewise at *Glouceſter*, and sundry others were all originally framed

med in the Latine tongue in the reigne of the ſaid *Henry* the third: Alſo the Acts made in the firſt, certaine in the ſecond, and the Acts made in the third Parliaments all holden at *Weſtminſter* in the raigne of that victorious and renowned Prince King *Edward* after the Conqueſt ſurnamed the firſt, compiled by Parliament for the good government of this Kingdome, were written alſo in the Latine tongue. *Weſtm. 1. Weſtm. 2. Weſtm. 3.*

Secondly, many learned Writers have compoſed divers excellent Treatiſes of the Lawes of this Realme, in the Latine tongue, as namely, that ancient Treatiſe compoſed by *Ranulphus de Glanvilla*, a learned Iudge of this Land, who is ſaid to have gone in perſon with King *Richard* the firſt into the holy Land, and to have ended his dayes at *Ptolomais* then called *Acon* or *Acres* a Maritine Towne of that Country. Treatiſes of Law in the Latine Tongue. *Ra. Glanvill.* Ended his dayes at *Ptolemais* in the holy Land.

I will here adjoyne the learned Treatiſe (and as the times then ſtood) I might well call and affirme the eloquent Treatiſe of the Common Lawes framed by *Henry de Bracton* a moſt learned Iudge of this Land, living in the latter end of the raigne of King *Henry* the third, and in the entrance of King *Edward* the firſt his regiment: This Treatiſe is repleniſhed with many excellent ſentences, fitly and aptly compoſed in Latine; and by the reading of this worthy worke, the ſtudent ſhall truly underſtand not onely the conformity our Nationall Lawes then had with the Civill, Cannon, or Eccleſiaſticall Lawes, but alſo ſhall well perceive what the Common Law of this our Coun- *Hen. de Bracton.*

trey was before the making of divers Statutes which have altered the same, whereby great light may bee had, and a great helpe obtained for the better understanding and true interpretation of the same.

Likewise, there is a learned Treatise composed by a learned yet unknowne Author whiles he was a Prisoner in the Fleet, and therefore the said worke or tract is called *Fleta*, in the time as it seemeth of King *Edward* the first, and although there doe now remaine but a few Manuscript copies thereof, as having beene never imprinted, yet is it worthy to see the light, and for the furtherance of the student of the Lawes to be divulged, and this also was written in the Latine tongue: I might remember two Treatises, the greater, and the lesser, gathered by *Radulphus de Hingham*, sometime Chiefe Iustice of the Common Pleas, whose monument yet remaineth in the Cathedrall Church of Saint *Paul* in *London*, and written in Latine, but in corrupt language as the times then afforded.

Fleta.

Ra. Hinghã.

But passing over many other in silence, I will conclude with that little Treatise made *de laudibus legum Angliæ*, in praise and commendations of the Lawes of this Land by comparison with the forreigne Lawes of some other Countries devised and written in the Latine tongue by that sincere and most learned Iudge, Sir *Iohn Fortescue* Knight, thereby to incite by many arguments the Prince, sonne and heire to King *Henry* the sixt, to the knowledge of the Lawes of this Country:

Io. Fortescue.

it seemeth by many passages of this Treatise, that the same was contrived in the Kingdome of *France*, during such time as the Queene with her said sonne the Prince remained there to sollicite ayde for her husband. This Author at the writing of this Treatise was as it seemeth Chauncellor to the Prince, and afterward Chiefe Iustice of the Kings Bench: This little worke is well worthy the perusall, plentifully shewing the learning of the Author in Divinity, Philosophy, and other good literature, besides the knowledge of the Lawes of this Realme, a man I say who for the fidelity he bare to his Master, tasted of the tempest then stirred in the end of his time, having had both his rising and his ruine in that fatall fall of his Lord.

Writs ought to be framed in true and congruous Latine.

Thirdly, all the formes of writs are and ought to be framed in the Latine tongue, and if they do containe false Latine, they are abateable, and to be defeited, and the party plaintife who pursued the same, shall bee driven to purchase a better writ, and to begin a new. For the better understanding whereof, let mee observe something of the nature of Writs.

Definition of a Writ.

A Writ is the commandement of the King, formed in Latine, directed either to some Minister of his Courts, or sometime to the partie Defendant, at the pursuite of the Plaintife, for the better administration of Iustice. This Description concerneth all manner of writs, which as touching their forme, are short and briefe, and therfore in Latine are called *Brevia*, in French *Briefes*

The Etimologie. for their shortnesse in English Writs, for that they are Mandates in writing. The latine Etymology of the name, *Bracton* yeeldeth thus: *Brevia dicuntur (per modum Regulæ juris) quia rem quæ est & intentionem Petentis brevitur enarrat:* And yet ought they not through brevity to bee obscure, but cleare and in a compendious manner to comprehend the matter therein contayned: They ought to be formed in words, proper & perspicuous, free of ambiguity, no prepostorous order, no doubtfull reference, no idle repetition, no omission of needfull matter, and ought to bee formed in apt, true, and congruous Latine.

Division. Writs are in sundry manners divided, (1) sometime in respect of their matter; (2) sometime in respect of their forme; (3) sometime in repect of the efficient cause; (4) and sometime againe in respect of their finall cause.

In respect of their matter, all Writs are of three kinds, that is, (1) Originall, (2) Meane Proces, (3) Iudiciall.

Defin: An originall Writ, quid? An Originall Writ is the Commandement of the King, formed in Latine, issuing out of the Chauncery, sealed with the great Seale of *England*, contayning the cause of suite directed to a Minister of the Court to compell the defendant to appeare and answer at a day prefixed for the returne thereof.

Etimology. The Originall Writ is the foundation of the suit, and therefore is called originall, for that it is the first writ sued forth at the beginning of the suit, to bring the defendant in Court to answer.

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In respect of their matter, they are divided thus; They are either (1) Reall, (2) Personall, (3) Mixt, or (4) neither, as the Appeale. *Divisio in materiam & formam.*

In respect of their forme, they are either of a setled and composed forme, and therefore called *formata:* or without a setled forme, but doe vary according to the circumstance of the cause, and called by *Bracton, Brevia Magistralia*; the other *Brevia de cursu.*

In respect of their efficient cause all these Originall Writs doe issue, as hath beene said, out of the *Chancery*, which is the shop and forge wherein for the most part they are framed. The Magisteriall Briefes, because they vary with the case, require a Masters hand to compose them in respect of skill. But the other *De cursu, Writs of course*, because they have a setled forme prescribed in an ancient booke therefore called the *Register of Writs*, and vary not but *in mutatis mutandis:* they are written by a society of Clarkes of the Chancery called therefore *Cursitors:* But I purpose not here to make a full and liberall discourse of writs, this alone may suffice in this place, and for the matter in hand. *Causa efficiens.* *Cursitors, unde dicitur.*

Fourthly, it is manifest, that all the returnes of Writs, all manner of proceedings, all Counts or Declarations of the Plaintiffes or Demaundants, all Pleas, defences or exceptions of the Defendants or Tennants, either to the Iurisdiction of the Court, or to abate the writ, or in barre of the Action all replications thereunto by the Plaintife and demandant, all rejoynders or

ſurrejoynders, all iſſues taken, all verdicts, demurrers, continuances and entries of the judgements of the Court in ſundry formes, according to the ſeverall nature of the writs and actions in controverſie: Likewiſe all the proceedings in criminall cauſes and Pleas of the Crowne which concerne life or member by way of indictment or preſentment, the Arraignment, Tryall, and Iudgements thereupon had, are entred, written, and engroſſed in the Latine tongue; And therefore without the knowledge of this language, the ſtudent of the Lawes, the Practizer, and the Iudge muſt of neceſſity walke thorough a vale of darkneſſe and palpable ignorance in the ſuperlative.

By this which hath beene already affirmed may eaſily be conceived, that Grammar being the firſt Liberall Sciences is very behoovfull & needfull for a Lawyer, as by ſundry inſtances may bee made manifeſt in every part thereof. *Grammar* hath beene divided into theſe foure parts; *Orthographia*, *Etymologia*, *Syntaxis*, and *Proſodia*.

Orthogra-phia. In *Orthographie*, which concernes true writing, we are taught that from the knitting together of Letters are made ſillables, of ſillables ſignificative words. Theſe words are twofold, Primitive, which were compoſed at the firſt to denote and ſignifie this or that thing, and words derivatives drawne from thoſe Primitives, which in writing ought to containe the radicall letters of thoſe Primitives, that thereby may be diſcovered and diſcerned the root and of-ſpring from whence they were drawne and deduced.

First therefore, as touching letters and syllables, sometime a letter is omitted which maketh the word written, no latine at all,

In a *Scire fac:* the writ was abated for want of a letter, for the writ was *ex insinatione,* which is no latine, whereas it should have beene *ex insinuatione.* So in a *precipe quod reddat,* the words were *precipe quod reddat kari;* where it wanted a syllable and should have beene *hæredi,* and this writ was abated. And sometimes for placing one letter for another, as in a writ of waste, the same was *ad destrictionem,* whereas it should have beene *ad destructionem.* So likewise an Inditement of Burglary was avoyded, for that it was *Burgaliter,* whereas it should have beene *burglariter,* although no perfect, yet allowed Lawyers Latine, and an artificiall word, a word of Art.

14. E. 3. 7.

41. E. 3. 21.

Cooke 2 part. lib. 3.

The second was of Grammar called *Etimologia,* hath two parts, for it doth not onely concerne the derivation of words, but also the forming of words in all the principle parts of speech, as of the Nounes, Pronounes, Participles, in number, case, gender, termination, declination, & such like; but also of verbs in declination, moode, tense, nũber, person, and such like, and in these things also the Lawes of this Realme require congruity to bee observed, according to the rules of Grammar. The writ was *hos breve,* where it should have been *hoc breve,* and therefore was abated, and could not be amended; one case for another.

Etimologia.

In a *Precipe quod reddat,* the writ was *quæ,* where it should have beene *quod,* one gender for ano-

another, and therefore was abated. In a writ of
12.H. 4. 10. *Iuris vtrum*, the writ was *sit* where it ſhould have
Fitz. n.br. beene *ſint*, one number for another, with divers
466. others, ſuch like examples.

Syntaxis. The third part of Grammer is Syntaxis or Compoſition of ſpeech, and hath theſe parts (1) the conformity betweene the verbe and the caſuall word; (2) betwene the ſubſtantive and the adjective; (3) betweene the Antecedent and the Relative which part hath ſundry examples in the Law, and would be tedious to remember.

Ob. prima. Theſe things notwithſtanding, there doe remaine certaine objections to be cleared; for firſt it may be objected that in the Courts of Iuſtice, the Clerks in the entring and enrolling of their Records, forme up their words in a ſhort kind of writing by certaine abreviations, by which are knowne the words intended; And therefore in this courſe which is moſt uſuall there can be but a ſlender obſervation of true Orthography.

Reſp. To this I anſwer, that among all the *Curſitors* and *Prothonotories*, and all other Clerkes in our Courts, there is obſerved a briefe and ſhort kind of writing for the better diſpatch of an infinite maſſe of buſineſſe in that kinde, and heape of writings which they termly undergoe, yet the ſame is not voluntary, or at pleaſure, or as every man will or ſhall deviſe, faſhion, or frame unto himſelfe, but ſuch onely vulgar, and well known both among themſelves, as all other that intermeddle therewith, which tract of time hath made familiar from age to age by expert obſervation. And
4.H.6.16. here

here may I remember that almoſt every of our Courts of Iuſtice hath his ſeverall ſet forme of handwriting, as the Chancery hand, conveyed in a faire forme of letter, little inferior to the print; and the Court hand ſomewhat diſtinguiſhed in forme of letters frō the ordinary ſecretary or ſet hand uſed among the vulgar, which our Anceſtors at firſt invented, and ever ſince to great purpoſe have practiſed, thereby giving the greater impreſſion, ſo that it may remaine legible to poſterity many hundred yeeres, as by our ancient Records, and many Monuments of Antiquity yet remaining of ancient occurrences before the *Norman Conqueſt* is evidently declared.

Secondly may be objected, that ſince the time that the Latine tongue was vulgarly uſed among the *Romans*, and other the Nations, that they ſubdued to that Empire (for they much endeavoured the propagation of their language) ſundry new things have beene invented, whereof thoſe ancient people had either no intelligence, or no uſe, and therefore where ſuch things doe occurre, there doe want words proper and peculier in the Latine tongue to denote the ſame, and men muſt of neceſſity bee enforced either to uſe barbarous words farre from the purity of the Latine ſpeech, or to invent new to expreſſe their meaning. *Ob. ſecundò*

For ſatisfaction and full declaration whereof, we are to conſider that uſually in courſe of Law foure kind of words are caried under the colour of latine in Law proceedings; as firſt, the true native and proper latine word if they bee found for *Reſp.*

the preſent purpoſe, whereof our Iudges have ever beene carefull, as by their ſundry conferences with Grammarians, and men learned concerning thetrue and naturall ſignification of Latine words almoſt every way extant in our books doe declare.

Coke lib. 10. fol. 133.

Secondly, there are words of Art in the lawes, as in other faculties.

And thirdly, certaine other words drawne from the ancient Idiome and language of our predeceſſors, the former Inhabitants of this Land, vulgarly and ſufficiently knowne, which receiving latine formes paſſe in our Lawes, as *felonia, felonice, Murdrum, Burglaria, Warrantia, Eſnitia, pars mulier, pro ſobole ex legitima uxore nata,* with many others of like derivation, as *meſuadgium* for an houſe, *toftum* for a decayed houſe, *gardinum* for a garden, *bruera* for furſe or heath, *maromium* for timber, *baſtardus*, for *nothus*, a baſe borne childe, and the like.

And fourthly, for new invented things not known to the Ancients, new words likewiſe haue had their originall, as *Bombardum* or *tormentum* for a gunne, *Pulvis tormentarius*, for gunpowder, *Stapedia* for a ſtirrop, *velvettum* for velvet, and many of ſuch like making, whereunto for better underſtanding we doe permit the Engliſh uſuall words to be adjoyned in our latine pleadings.

Ob tertia.

Laſtly, there remaineth this ſcruple, where it hath beene affirmed, that there is much reſpect had of the true propriety of latine words, it ſeemeth nothing leſſe, for thoſe formes are conceived

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in a baſe ſtile farre removed from purity of ſpeech ſo that the profeſſors of Law within this land can challenge no great commendation in this kinde.

To this is anſwered, that the Lawes of this Land neither doe, nor deſire to affect Eloquence in the Latine tongue, for wee have no uſe of the ſpeech thereof in our arguments, for as much as the Statute made 36. *E.* 3. *cap.* 15. hath ordained that all pleadings, and all arguments and diſputations of Law ſhould thenceforth be perſormed in the Engliſh tongue, whereas formerly as it ſeemeth it was put in ure in the French, remaining untill that time, as a badge of the *Norman Captivity*, whereof there is now no uſe but in the arraigning of an Aſſize, and an Appeale, and ſuch French Arguments as are uſed for exerciſe in the Houſes, and Societies of Court and Chancery. Nevertheleſſe the former uſage hath ſtill remained, that is, that all proceedings Iudicial ſhold be entred and enrolled in the Latine tongue, ſo that the Latine ſerveth to convey to poſterity our Memorialls and Records, and not our debate and ſpeech: The Antiquity whereof, whether it firſt grew in reſpect of the uſe thereof, retained among all Nations ſubject to that Empire upon like occaſion even unto this day; or whether for the Majeſtie of that language wherein all Arts of literature are ſtill promulged, or whether it may be reached unto the *Romane Conqueſt* of this Land, who long held it under their government, and reduced many parts thereof into Provinces, endeavouring (as their manner was) to propagate

Reſp.

36. *E.* 3. 15.

their language as largely as their Empire; or whether it happened in reſpect our Anceſtors the *Brittons* with good affection embraced that language, as *Tacitus* reporteth, I doe ſurceaſe in this place to determine.

But for farther ſatisfaction in this poynt, the Entries and enrollments of our Writs, Pleas, and all other our Law proceedings are neither baſe, abject, or horrid, as hath beene imported; for our Originall Writs of ſet forme are from ancient memory, have ever beene preſerved in the booke called the Regiſter, from the which our Clerkes may not ſwerve, to avoyd the infinite variety of formes which might otherwiſe enſue, and were firſt conceived and deviſed in as proper Latine, as the times wherein they were firſt invented, and the matter it ſelfe was able to beare. And as touching the other mentioned proceedings entered in the Latine tongue, although not eloquent, yet *ſatis laudato forenſi ſtilo*, as in any other Kingdome perſpicuous and ſignificant.

Let not the ſame therefore be a blemiſh to our Lawes, which hath invaded almoſt all other Sciences; for what horrid and incompt words hath Logicke and Philoſophy endured, introduced by their Dunces devices, as *Ens, entitas, quidditas, cauſalitas*, with a multitude of others impertinent to be remembred? with what improper tearmes and barbarous ſpeeches have the Schoolmen daubed Divinity? What hath beene in this kinde brought in upon the pure and cleare fountaines of the Digeſts of the Civill Lawes? which being

being compiled out of ſundry moſt excellent ſentences, drawne out of the workes and paſſages of the ancient *Romane Lawyers*, doe retaine the ſame purity and conformity of a cleane and neat ſtile, as though all had beene penned by one man; and yet are in a manner defiled by the *Feudary Tenuriſt* writers of the middle age in their *Gloſſes* and *Commentaries*, as thoſe learned Lawyers of this latter age *Alciatus*, *Budæus*, *Cujacius*, and the reſt have undergone an *Herculean* labour to cleanſe the ſame.

But to conclude this matter; the Students of our Lawes, and the profeſſors thereof may well defend themſelves by the teſtimony and authoritie of the beſt Writers in this behalfe: For firſt of all *Ariſtotle* himſelfe giveth warrant, *Quod nova vocabula ſunt facienda cùm ad res explicandas nulla ſuppetunt voces*: And herein they may bee bold to ſtand to the judgement of *Tully* himſelfe who affirmeth, *Omne quod de re bona dilucide dicitur, mihi præclarè dici videtur: iſtiuſmodi autem res dicere ornatè velle, puerile eſt; planè autem & perſpicuè poſſe docti & intelligentis eſt viri.* And I know no cauſe why wee may not ſay the ſame of our Lawyer which he affirmeth in that Booke of the Philoſopher, *Philoſophum ſi afferat eloquentiam non eſſe aſpernendum, ſi non habeat non eſſe ab eo admodum flagitandum, dum tamen complectatur verbis quod vult, & dicat planè ut intelligatur.* And ſo let me ſay, if our Lawyer or Pronotorie in drawing up his pleadings can uſe a good phraſe and pure Latine, I will never

Ariſt. in Categ. Relativis.

never blame him, if not, I will not expect it at his hands, ſo that that which he hath drawne bee congrue, plaine, familiar, ſenſible, and eaſie to be underſtood.

Thus have wee produced two of the beſt Authors for our defence, the one for wit and knowledge the worlds wonder; The other for eloquent and excellent ſpeech in his native language the chiefeſt ornament. It ſhall ſuffice to conclude with a ſentence of a Chriſtian Father inferiour in humane learning to neither of them, whoſe ſpeech becauſe it is excellently to the purpoſe, I cannot let paſſe; *Bonorum ingeniorum inſignis eſt indoles, in verbis verum amare non verba; Quid enim prodeſt clavis aurea, ſi, quod volumus aperire, non poteſt? aut quid obeſt lignea, ſi hoc poteſt? quando nihil quærimus niſi patere quod clauſum eſt?* It is an excellent Argument of the beſt wits, not to hunt compt and filed words, but in words to embrace the truth, for what profiteth a Golden key, if it cannot open, and what hurt is it to uſe a wodden key, if it will open, when there is no other end of both, but to open that which was ſhut.

Cap. VII.

THe next ſucceeding *Science Liberall* is *Logicke*, and therefore order doth require wee ſhould here alſo make inquirie whether the Art of Logicke be neceſſary for the attaining to the knowledge of the Law. The queſtion hath beene diverſly debated by ſundry of *Ariſtotles* Interpreters, and ſuch as have written of that Science both touching the peculiar inſtance or *Hypotheſis*; as alſo more at large in the generall *Theſis*, namely, whether Logicke bee neceſſary for the better obtaining of other learned Sciences. In handling of this debate, we will hold our former propoſed courſe, and firſt of all let us object againſt the neceſſity thereof. *Logicke.*

Experience is a ſure foundation: many excellent Lawyers both in the civill Lawes of the Empire, the Cannon Lawes of the Church, and the Common Lawes of the Land have not beene skilfull in Logicke, and therefore Logicke is not neceſſary for the knowledge of the Lawes. *Ra. prima.*

Law Arguments are deduced more from authority then reaſon, for the Engliſh Lawyer in arguments requireth moſt the ſtrength of Caſes apt to the purpoſe, and Preſidents of former *Ra. ſecunda.*

times,

time, then discourse of reason; and therefore Logicke which respecteth onely the inference and discourse of reason, is not so needfull for a Lawyer.

Ra. tertia. The Lawes deale with particular instances, and individuall Cases, where the sundry circumstances accompanying the fact, make manifest difference, *inter æquum & iniquum; justum & injustum*; whereas Logicke dealeth not with universalities abstracted from the particulars, and exempt from their circumstances, and therefore Logicke not necessary for a Lawyer.

Ra quarta. A great part of Logicke doth treat of Propositions, and the framing of Syllogismes, but the Lawyer doth not argue syllogistically, and therefore needeth no Logicke.

Ra. quinta. Man is a living creature, by nature reasonable, and can by the gift of nature alone, apprehend, understand, inferre, collect, discourse, reason, prove, disprove, order, and dispose things conceived, and truly judge of them; and therfore where these things are by nature, what necessity is there to learne them by Art? for *sicut pupilla ineſt visui, ita anima Intellectus*; *Arist.* 1. *Ethic. cap.* 6. And againe the same writer, *homines à natura Dialecticos & Rhetoricos esse*; *Aristot.* 1. *Rhet. ad Theodectum, &* 1. *Elenchorum*. Every faculty and discipline of it selfe hath a distinct and peculiar manner of proceeding, and therefore a speciall Logicke must be framed for the study of the Law if any bee necessary at all, for the generall Logicke will not suffice.

The

The full handling of this question will give occasion of a large discourse, and incite us to set out and declare the principall parts of Logicke, and the true use thereof in the knowledge of the Lawes; wherefore lest our speech thorow multiplicity of matter might be confuse, wee will hold this order:

First, we shall endevour to produce the testimonies of most approved Authors of the part affirmative, wherein they have delivered the necessity or profitable use of Logicke. 1

Secondly, wee shall undertake by reasons drawne from the most parts of Logicke, to prove the necessity, at lest the utility thereof. 2

Thirdly, wee shall propound those places out of our owne Bookes of the Common Lawes of this Land, where the use of Logicke hath either beene acquired, admitted, or practized. 3

Then handling that part of Logick which concerneth Method, wee will dispute whether the knowledge of the Law may bee brought into a Method yea or no? 4

Then wee shall consider the state of this maine question according to the different opinions of such as have written thereof. 5

And lastly, Answer the arguments and objections at the first proposed on the contrarie part. 6

As touching the first of these; although Logicke was not brought to perfection in *Platoes* time, yet is the same greatly commended by him in some places of his works, as in *Phædro & Parmenide.* *Ra. prima.*

vide. In *Phædro* after some use of Logicall division expressed, *Socrates* falleth into a wonderfull commendation of Logicke. *Iamblicus* in his Epistle to *Sopratus* affirmeth, That *nulla scientia Philosophiæ absque Dialecticæ rationis comparari potest.*

How necessary the use of Logicke is for the obtaining of other knowledges of other sciences, is made knowne by explicating the parts thereof in divers passages by *Aristotle* himselfe as 1. *Poster. cap.* 2. 1. *Topic. cap.* 2. and in *Elenchis sophisticis, cap.* 3. and in sundry other places of his workes, and in 4. *Metaph. texto* 8. he sheweth, that the ancient *Philosophers* fell into many errours through the ignorance of Logicke.

Marcus Tullius Cicero the great *Romane Orator* in many places of his workes extolleth the necessity and use of Logicke. In his *Tusculane Questions* thus, That it is the Art *quæ rem definit, genera dispertit, sequentia adjungit, perfecta concludit, vera & falsa dijudicat, ex qua tum summa utilitas exitsit ad res ponderandas, tum maxime ingenua dilectatio & digna sapientia:* Logicke is an Art that defineth and setteth forth the nature of things, it divideth the generall into its particular parts, it sheweth the necessary coherence and dependancy of the consequent deduced from the antecedent, it discerneth betweene truth and falshood, out of which ariseth as well an excellent profitable use in the search of things, as also an ingenuous delight a worthy wisedome.

In his Booke *de Finibus*, he calleth Logicke the *Rule of knowledge*, *Quæ quasi ut lapsa de cælo sit ad*

cognitionem

cognitionem omnium, ad quam omnia judicia verum dirigantur: qua ſervata, nunquam ullius orationis vicis, ſententia deſiſtamus: A rule of knowledge I ſay ſent or ſlidden downe from heaven for the obtaining of the knowledge of all things, by which all judgements are directed, and which rule being truely obſerved, we can never by whatſoever powerfull ſpeech of any, be vanquiſhed or diverted from apprehended truth, and a ſetled judgement. To the like effect he affirmeth by the example of *Servius Sulpitius* a famous *Romane Lawyer* who was *Iuris-conſultorum eloquentiſſimus, & eloquentium Iuris conſultiſſimus*; That Logicke is an Art *Quæ docet rem univerſam tribuere, in partes, latentem explicare definiendo, obſcuram explanare interpretando, ambiguum, primùm videre, deinde diſtinguere, poſtremo habere regulam qua vera & falſa dijudicarentur, & quæ (quibus propoſitis) eſſent, quæque non eſſent conſequentia.* Hee ſaith, That this *Sulpitius*; *Ad ea quæ confuſè ab aliis aut reſponſa aut acta ſunt, diſertè & reſpondiſſe & egiſſe; quod is ad juris civilis cognitionem Dialecticam omnium artium maximam quaſi lucem attulerat.*

Thus much out of the ancient Heathen; Let us now deſcend unto the Fathers of the Church: *Origen* in his ſecond *Homily* upon *Exodus* hath theſe words, *Eruditio iſta* (ſpeaking of Logick) *ad omnem pervenit ſenſum, & per eam quiſque meditatus & ſotus, ad divinorum intelligentiam paratior venit.*

Clemens Alexandrinus thus, *Dialectica velut manuducit ad veram æternamque ſcientiam, & ad cognitionem ſupremæ veritatis.*

Saint *Ierome* thus; *Verè quicquid perversorum dogmatum est, & putatur esse robustum in terrena sapientia, hoc Dialectica arte subvertitur, & instar incendij in cinerem favillasq́ dissolvitur.*

Saint *Augustine* is also evident in many places as *li. 2. de ordine. Ad religionis Christiana cognitionem nemo aspirare debet sine Dialectica.* And againe, *lib. 2. de Doctrina Christiana: Disputationis disciplina, ad omnia genera quæstionum, quæ in literis sanctis sunt penetranda & dissolvenda plurimum valet! tantùm ibi cavendum est, libido rixandi, & puerilis quædam ostentatio decipiendi.* And in sundry other parts of his works, as *lib. 1. contra Crescomum Grammaticum*; and *lib. 3. contra Academ.*: And he hath defined Logicke to be *Ars artium, Scientia scientiarum, quæ aperta omnes alia aperiuntur, & quæ clausa, omnes alia clauduntur.*

By these Fathers of the Church, it may appeare how needfull they held Logicke to bee for the knowledge of Divinity.

The Interpretors of *Aristotle*, and the Writers of latter time *pleno intonant ore.*

Avicenna in his Treatise of Logicke, *Cap. 2. Natura & prima inchoatio hominis, non fuit sufficiens ad verum cognoscendum, fuit ergo opus aliqua arte, per quam, modum procedendi in cognitione haberemus, ut tali modo perfecto, postea ad rerum speculationem accederemus, hæc autem ars fuit Logica, seu Dialectica, quæ modum universalem tradit, rem quamlibet speculando.*

Aquinas saith it is, *Scientia rationalis, ad finem rationis directiva.*

Albertus

Albertus magnus likewiſe: *Logica eſt qua à Phantaſiis, quæ videntur & non ſunt, liberat; errores damnat, falſitates oſtendit, & lumen rectum in omni opere contemplationis præbet.*

I will conclude with that which *Barth. Kickerman:* hath in *Gym. Logico, lib.* 1. Logicke ſaith he, amongſt other things promiſeth, *Tria maxima bona, Veritatem, perſpicuitatem, & ordinem, quibus nihil eſt in humanis rebus, aut ſublimius, aut pulchrius.*

But it will here be objected, That I have ſtrayed from the queſtion, which is, whether Logicke be neceſſary for the obtaining of the knowledge of the Law? *Ob.*

To the which I anſwer; That otherwiſe thoſe Writers have laboured in vaine, who have publiſhed the Art of Logicke adapted for the Civill and Common Lawes, ſome in part as the *Topicks*, or places of invention legall; as *Tullij Topica ad Trebatium* a Romane Lawyer: *Claudius Cantiuncula, Nicholaus Everarde,* in their bookes intituled *Topica legalia, Hottoman* and others. *Reſp.*

And ſome others the Precepts of the whole Art, as *Chriſtopherus Hegendorphinus, Iohannes Thomas Freginus: Petrus Gambraus*, and others, as *Capellus, Bellonus, Oldendorpius, Neviſanus, Grammara, &c.* And how the ſame ſhall be needfull to the Common Law; That which we are further to declare will better manifeſt.

Concerning the Third propoſed matter, Theſe may be the reaſons following to prove Logicke

neceſſary or at leaſt behoovfull to the ſtudy of the Law.

Ra. prima. The Art of Logicke is the Art of reaſoning, *Ars argumentandi*, as one of the properties thereof, teaching to find out truth by argument and diſputation. But the Common Law of this Land (which is often ſtiled in our Bookes by the name of common reaſon) is deduced from principles evident and knowne, for the deciſion of ſuch things as are drawne into doubt, and are unknowne. The precepts thereof are taught by Logicke in the bookes of Demonſtration and Topicke parts of the Art of Logicke; and therefore is Logicke neceſſary for the obtaining of the knowledge of the Law, eſpecially for that all points debated or controverted in our Law, are either matters in fact, and ſo triable by a Iury: or doubts in law, determinable by diſputation and argument.

Ra. ſecunda. Againe, Logicke teacheth a man to collect the Axiomes, principles, grounds and rules obſerved in that Art which he ſtudieth, and being ſo collected aptly to diſpoſe the ſame, which yeeldeth diverſity of matter, and ready furniture for diſputation: but thoſe things are very neceſſary to be obſerved in the ſtudy of the Law, therefore is Logicke a very neceſſary ſcience for the obtaining thereof in this reſpect.

Ra. tertia. Our Lawyer in his Law-arguments, the better to demonſtrate and ſtrengthen his opinion is driven not onely to define or deſcribe the thing diſputed of, but to divide the ſame into parts, to diſtinguiſh

diſtinguiſh the divers ſignifications of the words, but alſo to ſearch and indigate the difference of matters and caſes propoſed: all which the Art of Logicke profeſſeth to teach; and therefore Logicke is neceſſary.

Every man in his Argument ought to covet to bee underſtood of them that heare him; for to what end elſe ſhould he ſpeake. *Ra. quarta.*

But a man is beſt underſtood when in obſcure matter he doth propoſe firſt, the moſt generall propoſitions, of eaſie apprehenſion, and out of them deduce others, and ſo to combine and knit all together, as all the parts in orderly diſpoſition may cohere, of which reſult thoſe three excellent things, *Brevity*, *Perſpicuity*, and *Verity*, all which Logicke promiſeth; and therefore is Logicke neceſſary.

When a doubtfull queſtion is propoſed, the truth is found out by Argument, debate, and diſcourſe of reaſon on both parts, as in all our law-arguments appeareth; and therefore ſuch debate and conflict of reaſon is ſaid to be the flayle whereby the corne is ſevered from the ſtubble, truth is tryed from falſhood (for there can be but one truth;) and therefore when there is diverſity of opinion, the truth can reſt onely but of one part, and the others muſt bee deceived thorow the deceipt of a faulty forme of their manner of reaſoning. *Ra. quinta.*

But *Logicke* teacheth a man to know the falacies of deceiptfull and imperfect Argumentes, and to reſolve them into better formes,

or

or to diſcloſe their imperfection; *Ergo*,

Ra ſixta. Every Artificer is made more expedite when he is furniſhed with apt inſtruments prepared to his hand, *Sed ſciendi inſtrumenta ſunt forma diſcerendi.* The Inſtruments of knowledge are the formes of diſcourſe; therefore our underſtanding which is the Artificer, is made more ready, when it hath right and fit grounds of argument reduced and prepared, which Logicke provideth, *Ergo*;

Ra. ſeptima. To obtaine the knowledge of any Science two things are required, firſt, the certaine dependency and coherence of the parts of the matter to bee knowne, and ſecondly, the aptneſſe of the inſtrument whereby we doe apprehend and know the ſame. The firſt of theſe doth reſult on the neceſſary conſequence, that is, betweene the cauſes and their effects; the latter dependeth of the knowledge of that diſcourſe of reaſon and argument which is uſed in the apprehenſion of Science, and giveth ſatisfaction and aſſuredneſſe of truth to the learner. And theſe things doth Logicke miniſter unto us; *Ergo.*

Ra. octav. It is the ſaying of *Ariſtotle, Scire arbitramur cum cognoſcimus rem ex ſua cauſa, & quod aliter ſe habere non poteſt.* Then wee are aſſured to know when the effect is known by his true cauſe, whoſe conſequence cannot faile: but theſe things wee learne by thoſe Arguments which we call *Demonſtrations*, which *Logicke* informeth us in. And therfore *Ariſtotle* truly obſerved, 2. *Metaph. cap.* 3. *Eſt impedimentum ad ſcientias capeſſandas non prius tenere modum ſciendi.* Where his Commentator *Averois*,

Averois, and the most of his Interpreters doe understand *per modum sciendi*, the Art of *Logicke*.

These things considered and laid together, it will not be hard or difficult, to answer the Reasons shortly of the opposite part.

As to the first: *Experience* indeed is a sure foundation, and many excellent *Lawyers* haue beene without *Logicke*: But yet if *Logicke* had beene joyned to their *Law*, they would have beene better strengthned in their knowledge, and more perspicuous in the delivery thereof. *Resp. ad primam object.*

To the second: *Law-arguments* are often drawne out of Authorities: but Authorities prove two manner of wayes; 1, sometime directly, and then is Authoritie called an inartificiall Argument: 2, but most commonly, by inference and consequence, which *Logicke* directeth. *Resp. ad sec. ob.*

To the third: *Lawes* deale with particular Cases, *Logicke* with universall Precepts. But when particular Causes are brought to argument, they are drawne to more generall *Theses* and *Propositions*. *Resp. ad tertiam Object.*

To the fourth: it is true that the *Lawyer* doth not argue syllogistically concise, and yet many times with a Syllogisme at large. *Resp. ad quar Object.*

To the fifth Objection: Reason is naturall, but yet it is polished by Art, and therefore best by the Art of Reason, which is *Logicke*.

It resteth now then, that wee examine *Logicke* by his parts, and try the use, utilitie, or necessitie thereof by examples out of our *Lawes*. *Resp. ad quint. object.*

Logica quid? Amongſt ſundry definitions or deſcriptions of *Logicke*, this is one vulgarly received, *Dialectica eſt rectè definiendi, dividendi, & argumentandi ars*: An Art teaching the true meanes of right Definition, Diviſion, and Argument. Wee will diſtinguiſh therefore theſe into parts, and ſpeake firſt and formerly of Definition.

Definitio quid? But before wee define what Definition is, becauſe there is an ambiguitie, and duplicitie of the ſignification thereof, wee ſhould firſt diſtinguiſh the ſame. There is therefore *Duplex Definitio.* 1, *Nominis:* 2, *Rei. Definitio Nominis eſt qua vocis ſignificatio explicatur.* The reaſon is added; *Sunt enim verba nota aut ſigna rerum.* And this alſo is twofold: The firſt called commonly *Etimologie*, of the Greeke words ἔτυμον & λογος: whereby is imparted the property, waight, and ſignification, or Emphaſis of the word: and the reaſons drawne therefrom are called in our bookes, Arguments, *ex vi verbi.* Thus *Tully* in his *Topickes*, and the *Latines* after him, have called *Notations, a notatione*; Or, Etimologie *eſt cùm vox ex ſua origine explicatur.*

Etimologia quid?

2 The ſecond kinde is called *Antilexis*; and is *cùm vox ignotior vel obſcurior voce notiore vel clariore idem ſignificante declaratur.* And of both theſe we have plentifull examples.

Etimologies of the firſt kinde, which are moſt effectuall, are diverſly deduced; ſometimes from the matter, ſometimes from the ſcope or end, ſome-

ſometimes from the effect, ſometimes from the properties, ſometimes from the object, & ſometimes from the oppoſite.

From the ſcope or end wee have ſundry examples; as a Colledge is in *Latine* called *Collegium, a cohabitatione, & quia ſimul colliguntur.* 9 & 10. *Eliz.* 267. *b. n. Dyer.*

So likewiſe wee call him an Executor of a laſt Will and Teſtament, of executing and performing the will of the dead; not that hee alwayes doth ſo, but that in reſpect of his power and duty he is bound ſo to doe. *Com. Pl.* 2. 280. *b.*

So a Iudgement or Sentence of a Court is called *Iuditium quaſi Iuris dictum,* The finall ſaying, judgement and doome of the *Law*. For that every Iudgement is taken and received for law, untill it be reverſed for error; for that is the ſcope and end of the *Law*. *Coke lib.* 10. 42. *a.*

Likewiſe a *Preband* is called *Prabenda, a prabendo auxilium & conſilium Epiſcopo:* for to that end were *Prebends* ordained in Cathedrall Churches, that the Prebendaries therof ſhould be Aſſiſtants and of Counſell to the Biſhop in his Epiſcopall function. *Coke lib.* 3. *fo.* 75.

Likewiſe ſaith *Bracton, Rex dicitur a regendo, non a regnando.* *Lib.* 3. *cap.* 9. *Lib.* 1. *cap.* 8. *Bracton.*

And the French word *Verdict* uſed in our *Law* for the reſolution of thoſe that are impanelled to try matters in fact, *eſt quaſi vere dictum*, as the ſaying of truth; and ſo to be received without contradiction untill it be defeated by an attaint.

Sometimes Etimologies are drawne from the effect or operation: whereof *Bracton* ſaith well, *Bract. lib.* 3. *cap.* 1.

That an Action or Suit in law may well be called an Action, *quum agitur de injuria:* for it is a complaint of an injury received.

Coke li. 10. ca. 116. 117. So *Damnum*, Damage (saith one) is derived *a demendo, cum diminutione res deterior fit.*

Littl. con. cas. 510. A Confirmation is so called, as *Littleton* affirmeth, *& idem est quod firmum facere*, of the operation it hath to make stable or firme a former Grant.

14. H. 7. So is a Surrender, *Quia sursum redditio*, and of the two French words *suise & rendre*, or yeelding up of an estate againe to the Lessor or his assignee to the immediate Reversion from which it was derived.

Bract. 112. 413. To like purpose a Writ is called in Latine *Breve*, and in French a *Briefe*, for the brevitie of it, and for that, (as *Bracton* saith) *rem quæ est & intentionẽ petentis breviter enarrat.*

So, a *Fine*, whereby lands or inheritances are conveyed in Courts of Record by concord and agreement of the parties, in respect of their operation, scope, and strength to make peace, and settle the Inheritance: Of which *Glanvil* the most ancient writer now extant of our *Law*, giveth an intimation when hee writeth, *Dicitur talis concordia finalis, quia finem imponit negotio, adeo ut neutra pars litigantium ab eo poterit recedere.* Which is also affirmed by the Statute of 21. *Ed.* 1. *de finibus levandis*, where the words are, *Quia Fines in curia nostra levati, finem litibus debent imponere: & ideo Fines dicuntur maximè.*

Glanvil.

21. Ed. 1.

Coke li. 10. fo. 26. So wee say that the foundation of a Colledge, Hospitall,

Hoſpitall, or ſuch like is called *fundatio, quaſi fundi datio, vel fundamenti locatio.*

Likewiſe a Villeine, a man of ſervile or baſe degree is called in our Law in Latine *ſervus*; for as *Bracton* ſaith, *dicitur ſervus à ſervando, non à ſerviendo, antiquitùs enim ſolent Principes captivos vendere, & ideo eos ſervare & non occidere.* And in Engliſh we call him Villeine *à villa*, from a Country Farme, whereunto they were deputed to doe ſervice, as our *Villeines regardant* to *Mannors* were, as old Records and Authors affirme, *gleba aſcriptitia*, tyed to the Turfe: Or rather of the word *vilis* of his condition vile and baſe. And the woman Villeine as *Littleton* ſaith, is called a *Neefe*, *quaſi nativa*: The making free of both which, or their Infranchiſment, is called in Latine, *Manumiſſio, à manu mittere, quod idem eſt quod vel extra manum aut poteſtatem ponere vel dimittere*; For *manus* in the Law Metaphorically ſignifieth either power or poſſeſſion, alluding to the old Ceremonie uſed in the infranchiſment of Bondmen, whereof *Iſidorus* ſpeaketh, *manumitti ſervus dicebatur, cum Dominus ejus, aut caput ejuſdem ſervi, aut aliud membrum tenens, dicebat, Hunc hominem liberũ eſſe volo, & remittebat eum è manu.* The ancient forme and Ceremony thereof among our Anceſtors the Saxons was in this manner: *Si quis velit ſervum ſuum liberum facere, tradat eum vicecomiti per manum dextram in pleno Comitatu, & quietum illum clamare debet à jugo ſervitutis ſuæ per manumiſſionem, & oſtendat ei liberas portas & vias, & tradat ei libera arma, ſcilicet lanceam & gladium*

Bracton li. 1. ca. 6. pa. 3.

Lambert. APXAIONOMIA. fo. 126.

& deinde liber homo efficitur.

So the word *Remitter*, which is an ancient tearme of the Law as *Littleton* saith of the word (*mitter*, or rather of the French word *remitter* to reſtore) and importeth a reſtitution of poſſeſſion unto a mans ancient right.

Litt. li. 3. cap. 12. Remitter.

Likewiſe *Mortmaine* which is a gift of Land or other hereditaments to a Corporation, which hath a perpetuall ſucceſſion, and therefore never like to returne to the Lord by Eſcheat or Donor by *Reverter*. And therefore as one ſayth, it ſeemeth to be taken into a dead or dying mans hand which holdeth faſt whatſoever it claſpeth. Or as the *Feudiſts* affirme; *In mortuam manum vocarunt, quod res ſic data tanquam mortua, uſui illorum mortalium in perpetuum adempta eſſent*: or elſe as another of the contrary: *Quia poſſeſſio quaſi immortalis eſt, quia nunquam heredem, vel ſucceſſorem, vel poſſeſſorem habere deſinit.*

P. Com. 139. ca. P. Weſton.

Pol. Virgil. lib. 17.

Hottomanus de verbis Feudalibus.

So we call a *Rent* paid yeerely for Land or other things *Redditus, à reddendo*, becauſe it is yeerly yeelded or reſtored for the Lands, &c. Or rather as ſome will *à redeundo*, becauſe it doth returne to the Leſſor or Donor for the iſſues and profits of the Land: And in Engliſh it is called a *Rent* of the French word *Rentor* to rate or Aſſeſſe at a price.

Coke lib. 10. f. 28. a.

As concerning theſe *Derivations* or *Etymologies* drawne from the finall cauſe or effect, I was not minded curiouſly to diſtinguiſh, for that in theſe things which doe depend of humane Acts, wherein the finall cauſe and effect is all one; for that the

the operation is attempted and atchieved for the effects ſake.

But to proceed; Sometimes alſo Etymologies are drawne from the forme or manner of doing or working.

So we call a Common, to be a right whereby we take ſome kinde of profit in the land, or ſoyle, or inheritance of another, together in Common with the Owner or others, which *Bracton* expreſſeth by way of Etymology thus: *Communia ex virtute vocabuli componitur ex una & cum (& ſubintelligitur alio) Quia communia eſt in alieno & una cum alio & non in fundo proprio, quia nemini ſeruit ſuus fundus proprius.* *Bract. lib. 4. c. 33. f. 223. 13. H. 8. 16. a.*

Likewiſe wee call certaine Lands Copyholds of the forme and manner of Tenure, becauſe the Tennants thereof doe hold the ſame *per copiam rotuli Curiæ Domini*, they have no other evidence or writing of their Tenure; but the Copy of the roll of the Lords Court.

But of theſe we have ſaid ſufficient, let us now ſpeake of the other kind which is called *Antilexis*, when an obſcure word is explained by another more familiar or better knowne: This is performed when an Engliſh word is expounded by a Latine word, or in any other language from whence the word was firſt derived.

As adminiſtration of goods of an Inteſtate is ſaid to bee *ordinatio ſeu diſpoſitio*, 1. *Eliz. Dyer.* 166. b. *Lamberts Iuſtice li. 1. ca. 17. 22. b.*

An Aſſault upon a mans perſon by another, is ſo called of the Latine word *aſſultus* and doth import *Aſſ. pla. 6. P. 6.*

port the offer of any hurtfull blow or fearfull ſpeech.

An Arreſt is ſaid to be the reſtraint of a mans liberty by power or colour of a lawfull Warrant, derived as ſome thinke from the French word *arreſter* to ſtay, or elſe farre fetched from the Greeke word *apiemo* a Decree or ſentence of the Court.

Lamb. Iuſtic. li. 1. cap. 16.

So *nomen à noſcendo, quia notitiam facit*, whereupon ſaith *Bracton*, *Ideò impoſita ſunt nomina ut demonſtrent voluntatem dicentis, & utimur notis in vocis miniſterio.* So that we may eaſily obſerve; That many of theſe of this latter kinde are meere Derivations, as *Contract à contrahendo, Deodand, quaſi Deo dandum, id eſt, in eleemoſynas erogandum, Divortiũ à divertendo, Dureſs ex duritia*, of ſtraight impriſonment or hard intreaty. *Larceny, id eſt, latrocinium, homicidium ab homine & cadio. Paraphernа, id eſt, præter dotem*, and ſignifieth *mundum muliebrem*: Peace *à vocabulo latino Pax: Lamb. Iuſtice, lib. 1. cap. 2. f. 67.*

Bract lib. 4. ca. 20. f. 188.

17. E. 4. fo. 2.

Lamb. Iuſt. Bract. lib. 3. 120. b.

A Court of Pypowder, a Court belonging and incident to Markets and faires, to yeeld Iuſtice to the buyers and ſellers comming thither, which becauſe they are moſt frequented in Summer, the word was given of the duſty feet of the commers.

11. E. 4. 9. Lamb. de curijs.

A Preſentment which is preſented by an Inqueſt containing ſome crime or neuſance, wherof they had to enquire, is derived of the French word, *preſenter*.

Records are ſo ſaid of the verbe *Recordor* to remember, becauſe they are *Remembrances, & vetuſtatis*

Lamb. Iuſt. lib. 1. ca. 13.

ſtatûs & veritatis veſtigia, the lively repreſentations both of former time and truth: *Reverſion* of the word *Reverterr*, or as *terra revertens*. *Coke lib. 2. fo. 5.*

An eſtate Tayle, of the French word *tailer*, to docke, or cut, limit or appoint in certainty, and many ſuch like, whereon I need not to inſiſt. *Litt. l. 1. c. 2.*

Sometime the Derivation of the word is deduced from ſome ancient word in old time uſed although now antiquated and growne out of uſe, and yet nevertheleſſe ſuch as giveth light to the preſent knowledge of the word, as *Conſtable* an ancient Officer of this Kingdome, derived of two old *Saxon* words, *Kinning* which ſignifieth King, and *ſtable*, ſtability, as the ſtabilitie of the King and Kingdom; So the word Farme in one ſignification importeth Lands, or other inheritances, holden for a yeerly rent, *quaſi feormian*, which is an old *Saxon* word, ſignifying to feed, or render victuall; for that in ancient time they rendred victuall for the moſt part, and not money. *Lamb. de Conſtables.* cyng. Feoſmian. *Lambert in Archeonomia*

So warrantiſure, of the old word which ſignifieth to defend or acquit, for ſo ſaith *Bracton*, *Warrantizare nihil aliud eſt quam defendere, & acquietare tenentem, qui warrentum vocavit in ſeiſina ſua.* *Bracton li. 3. fo. 380. b. Paragraph. 2.*

So *Gavellkinde*, a cuſtome whereby every ſonne or heire male inheriteth a portion alike in his Anceſtors eſtate, and is derived of two old *Saxon* words *gife eal cyn*, that is, given to all the kinne; *Quaſi omnibus cognatione proximis data hereditas.* gife eal cyn.

So *Guilda Mercatoria*, an ancient word found in old Charters and monuments, and ſignifies *contuberrimum*: or a Corporation of Merchants. *Law. Arch. Coke li. 10. fo. 30.*

So Steward derived of two old words, *Steed* and *Ward*, and is as much to say, as a man appointed in my steed or place.

Coke lib. 9. fo. 45.

So the word *Wythernam*, yet much in use, drawne from two old and ontworne *Saxon* words *Wither, alterum*, & *Nam, pignus*; *quasi altera pignoris oblatio*.

pybep & Nam. Lam. Arch.

Sometimes Derivations are made of some old words, whereof the use from which the Derivation was made, is now utterly changed, as *socagiũ, id est, servitium soca, id est, caruca*, for that the word *soca* was used for a plough. But this service was after by generall consent of Lord and Tenant, redeemed by payment of a yeerly rent, and yet the signification remaining still, as Land given to plough the Lords Land, although the use of that service be abrogated, except upon Creation of the Tenure, it should bee reserved and so renewed.

So saith one, the houses of the devoted religious were called *Monasteria*, of the solitude or solitary life there led, which in latter dayes was nothing lesse, *Quia plerasq; monasteria nil minus sunt quam solitudines*.

Claudius Cantius. de lo legal.

Sundry other Derivations there are, which are but onely allusions strained and framed by the wit and industry of man, rather then from the native signification of the word, and therefore of lesse regard and moment, as *testamentum, quasi testatio mentis*, first devised by *Servius Sulpitius* the old *Romane Lawyer*, and used in our bookes, although impeached by *Aulus Gellius* in that age, or shortly

Aul. Gellius lib. 6. ca. 12.

shortly after as a straine of wit, and not out of any true denomination of the word.

So likewise of that straine is *agreamentum*, which one would frame as *aggregatio mentium*. *Com. Fogoss. 17.*

So *aquitas, quasi æqualitas, quia est rerum convenientia, quam paribus causis paria desiderat jura & omnia bene coæquiperat*. *Bract. lib. 1. ca. 3.*

So have they derived felony, *quasi felleo animo factum*; so another deriveth Robbery of the word *robe*. And another *terra, à terendo, quia vomere teritur*, and many such like, with the which I will not meddle. *Lambert. Coke l. 4. 124 Lam. Inst. l 1 ca. 20. Coke li. 4. 37.*

Here rests a few words of the use of these Etymologies, Notations, and allusions, and so an end.

Etymologies if they be rightly used and drawne from the finall cause or from the effect, doe not onely yeeld an Argument of good consequence, but also offer much illustration and delight; And therefore it is well observed by one, That *Etymologia est resolutio vocis in verum & proprium effectū, & verbi veritatem notificat, & ob id, eam Cicero veriloquium appellat*: And hence grew among the Græcians that usuall speech of the which *Isidore* speaketh, τὸ τῶν ὀνομάτων ἐπὶ τὸ ἀληθὲς ἀναγαγεῖν to learn aright it is principally necessary to search out the signification of the word. *Clau. Caniunc. de loc. legal.*

First therefore, we are for the right use of them to observe; That these derivations are not to be observed in every word; For there are and must be in every language many primitives which have

their native ſignifications according to the impoſers pleaſure, for that of the Poet is to purpoſe;

Multa renaſcentur, quæ nunc cecidere, cadentque
Quæ nunc ſunt in honore vocabula, ſi volet uſus,
Quem penes arbitriũ eſt, & mos & norma loquendi.

They are Derivative words which out of compoſition may beare interpretations.

2 Secondly, Arguments from Etymology are not to be uſed at all times and upon all occaſions, but rarely, and where neceſſity doth require the ſame, or delight, or apt conſequence doth offer fit occaſion; and therefore ſaith one, *Etymologia uſum habet neceſſarium, quoties interpretatione res de qua quæritur eget.* *Clau. Cant.*

3 Thirdly, that your alluſions be ſuch, *non abhorrentes ab ipſo vocabulo, ſed à ſono vocis provenientes:* not harſhly or hardly drawne or wrung out, but anſwerable to the ſound of the word, and application to the ſenſe.

It is not my purpoſe to ſet forth here when arguments and reaſons drawne from Etymologies, doe hold their conſequence, and when not, for therein the ſtudent of the Law muſt bee formerly inſtructed by the Precepts of the Art of Logicke; for this place will not permit the ſame, leſt I ſhould treat of Arguments before I come to Argument. But let me not here forget that Etymologies are moſt uſed by the Authors of our Lawes in their Treatiſes and Tracts which are of *Simplicis Thematis.*

Having

Having done with the derivation of words, we come now to the explication of the nature of the thing by definition.

Definition it selfe is thus defined, *Definitio est oratio, qua quid sit, de quo agitur, ostendit brevissimè.* It is a Proposition which doth expresse the nature of the thing shortly. And therefore *Aristotle* saith aptly, ὁρισμὸς τί ἐστι λόγος: or as in another place to the like effect: *Definitio est oratio, quæ quid est significans.* And therefore it is truely said of another, That *Fons totius explicationis est vera Definitio; nullus enim rem melius nosse videtur, quam qui quid eam sit aperte possit explicare.* A true Definition is the fountaine of explication: for no man knoweth any thing better then he which can aptly and briefly expresse the nature thereof, and what it is.

Definitio quid?

Arist. 1. Post.

2. Post. c. 10.

Kickerm.

Of Definitions there be two kindes: the one perfect and absolute; the other lesse perfect. The perfect Definition is that which doth consist *Ex proximo genere, & vera differentia*; as that whereby they doe define a man to be a liuing creature mortall endued with reason, the *Genus* whereof is a living creature mortall; which our English tongue cannot well expresse in one word, as it is by the *Latine* word *Animal*. But because this word is generall to many other living creatures besides, endued with sense, therefore that perfect difference, *endued with reason, rationale*, is adjoyned, whereby man is distinguished from all other things. For although Angels be indued with rea-

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ſon, yet are they not *animalia*, and there is nothing which may be called *animal rationale* but man alone. This rule I here remember, *Quod genus & differentia ex Prædicamento ſumantur.*

But theſe things I leave to the *Logicke-ſchoole*: And for that our dull underſtanding can hardly diſcerne the true eſſentiall difference of things, we are driven, and eſpecially in accidentall matters, to expreſſe by their properties, parts, cauſes, or accidents; which a *Logicall* writer hath well conceived in theſe words, *Cùm certum ſit, hominem internas rerum formas perfectè non cognoſcere, ideo loco differentiarum ſeu formarum, propria accidentia tanquam, ſcilicet, ſenſibus viciniora in definitione ſumimus.* Another in this manner, *Nullius rei majori laboramus inopia quam differentiarum.* And another, *Laboramus plerumque vel maximè omnibus è rebus verarum differentiarum penuria, quæ, hic ut in rebus cæteris pro veris habeamus, quæ proximè veris videntur accedere.* Therefore the imperfect Definition, which is called a deſcription, is thus ſet forth:

Definitio imperfecta eſt definiti per terminos minus eſſentiales explicatio. Of this there are, as ſome do teach, theſe kindes; *Cauſalis, Partialis, & Accidentalis.* Others ſomewhat more fully thus, *Imperfecta definitio ſive deſcriptio, eſt principalis vel minus principalis. Principalis, definitum explicat genere & accidentibus, vel cauſis, vel effectibus propriis, vel partibus.* And therefore that which is given of them *ex cauſis*, is called *cauſans*, and is nothing elſe but *Oratio rei proprias cauſas manifeſtans*: ſo that

that they doe affirme, That such descriptions are causall, and given *per materiam & formam* to be essentiall.

Descriptio, or *Definitio minus principalis*, which is, *ex accidentibus*, and therefore called *accidentalis*, *est definiti ex merè contingentibus terminis, vel etiam externis explicatio, sive generis accurata assignatione*. And here I thinke it not amisse to observe some rules for good definition or description. And therefore.

First, every good definition or description ought to containe two principall parts: 1, That which is generall, and therefore called *Genus*, wherein the thing defined hath communitie with other things: And 2, that which may more particularly expresse the nature thereof, to distinguish the thing defined from all other things *loco differentiæ*. And therefore saith *Tully ad Trebatium*, *Sic veteres præcipiunt, cum sumpseris ea quæ sunt rei quam definire velis cum aliis communia, usque eo persequi dum proprium efficiatur, quod nullam in aliam rem transferri potest*. Another setteth the same downe in this manner: *Primò quærendum est Genus, deinde dividendum donec tandem veniatur ad eam orationem quæ cum definito convenit*.

Some men there are, which though they extoll the true definition (where it may be had) before the description, as it deserveth; yet hold they the description more familiar, and apter to teach, then the former, whereof *Lodovicus Vives* writeth thus; The perfect Definition (saith hee) *verior quidem est, sed tamen obscurior: hinc fit, ut*

essentiales

essentiales definitiones parùm doceant mentem hominis non exactè docti, cui quidem longè utilior fuerit descriptio ab externis accidentibus, quæ sensu possint percipi. And againe, *essentiales, & exactissima definitiones parùm nos docent, & idcirco apud authores bonos sunt raræ.* For (saith one) *Definitio essentiam, descriptio intelligentiam rei claudit.*

Authors have given certaine rules also appliable to both these kindes, which I may not let passe: because in this place they stand (as I conceive) to good purpose. Whereof the first is thus: *Removeri debet à definitione omnis ambiguitas, & omnis obscuritas, quæ fit duabus causis: primò, ex translatione Tropi, & Metaphoræ; secundò, ex insolentia vocis, omnis vox inusitata est obscura.* To this effect hath *Aristotle* these words, *Oportet eum qui definit, maximè omnium clarissima interpretatione uti; siquidem cognoscendi & intelligendi causa traditur.* Wherefore the first rule as you see, *ut clarior sit definitio, & debet dari per notiora*: for that *Definitio prolata sensui discentis notior & magis obvia esse debet.*

Arist. Top. 6. ca. 1.

The second rule is, That every good Definition *debet reciprocari cum definito*, it ought to be reciprocall and convertible with the thing defined or described. For the better understanding whereof, it is to be observed, that every thing needeth not a definition or description: for particular and individuall things subject to sense, need no definition or description: for that *Definitio debet esse de universalibus.* And hereupon *Aristotle* affirmeth, *Omne quod definitur est species.* And although there

9. Metaph. ca. 6.

there be five universalities or Prædicables as they tearme them, as *Genus, Species, Differentia, Proprium, & Accidens*, yet are there but foure *Prædicata Topica*, for *species* is the thing defined, and wherein, and whereby the rest are verified. And againe, *Definitio est de rebus compositis à natura & finitis.*

The third rule is as a consequent of the former, *Nihil habeat superfluum aut diminutum Definitio:* for if the definition or description be convertible, and reciprocall with the thing defined, or described (as it ought) it cannot have either superfluity or defect; this Precept I thought necessary in this place, because the student might be the better enformed to frame his Definition or description.

Let me here say a word of the efficacy and use of definitions and descriptions; And after shall I endeavour to yeeld some examples out of our Lawes: A Definition is said to be one of the Instruments of knowledge, and that two manner of wayes; *Primo in ordine ad definitum*, whereby the thing defined or described is knowne, not by discourse of reason but in a manner by contemplation intuitive, resembling the Angells knowledge; and therefore it is said well by a Writer, *Definitio est intuitiva cognitio*; And hence it is that *Aristotle* so highly in many places of his workes commendeth the same *Difficilis est omnis disputatio, nisi id de quo ea instituitur rectè ab initio defineatur.* And againe in the same place, *Omnis quæstio de qua disputare difficile est vel definitionem requiris,* *Kickerm. Arist. 8. Topic. ca. 3.*

vel distinctionem nomine. And in the fourth booke of his Physicks, *Text.* 31. *Arist.* setteth forth the effect of a Definition, *Quod per eam omnia dubia solvi possint & debeant.*

Whereupon one writer groweth so confident that he thinketh, that out of a full definition of a Mariage, and of an Oath, all controversies concerning either of them may bee fully decided; these be his words: *Hujus utilitatis duo exempla sunt valdè conspicua, unum in doctrina de conjugio, alterum in disputatione de juramento, omnes quæstiones de his materijs facilius & certius possunt explicari.* And therefore *Tully* in his Offices would have everie orderly treatise *à definitione proficisci.*

Strigelius.

De officijs lib. 1.

Secondly, a Definition is an Instrument of knowledge, *In ordine ad demonstrationem, ad sciendam conclusionem, hoc est, ad proprietatem demonstrandam passionem de subjecto.* But of this more hereafter, when we shall speake of Arguments necessary, which are called Demonstrations.

Zanchius l. 2. lo. in procem.

Let us now exemplifie what we have said, by instances drawne out of the Common Lawes of this Land.

Feoffment, quid?

If I would define or describe a Feoffment, I must first seeke out a Generall or *Genus*; as thus, A Feoffment is a conveyance, but because there be sundry other conveyances, I must proceed further to distinguish the same from all other conveyances; and therefore I adde and say, A Feoffment is a conveyance which passeth an estate in

Fee-ſimple by Livery of Seiſin; And hereby I have diſtinguiſhed it from all conveyances of record, and conveyances that inure by way of grant; But becauſe likewiſe Leaſes for life are likewiſe paſſed by Livery of ſeiſin; and likewiſe a gift in Taile, paſſeth by Livery and ſeiſin, I have added the laſt complement and full difference in theſe words, in fee ſimple. Wherfore in every feoffment two things are of neceſſary regard; Firſt, that it is performed by Livery of ſeiſin. And ſecondly, that it paſſeth an eſtate in Fee ſimple: for Lands given in taile and executed by a Livery, we doe not call a Feoffment, but a gift in Tayle.

Fine, quid?

If I ſhould define or deſcribe a fine, whereby Lands, and other hereditaments are conveyed, I would thus deſcribe the ſame.

A fine is a conveyance of Record by Concord betweene the parties upon licence obtained in a ſuit depending betweene them in the Kings Court of Common Pleas. Where a Conveyance is the Generall or *Genus*, The words (of Record) make a difference from other conveyances paſſed in the Country in Pais. And becauſe there are alſo ſome other Conveyances of Record, there is added further the eſſentiall difference, which is the forme of a Fine, namely, the concord upon licence obtained; for otherwiſe ſuch concord cannot be admitted in an action depending between them: for without Action, there can be no Fine, which action or ſuit, muſt concerne Lands or Hereditaments, whereof the fine is levied, or upon an action of Covenant to levie ſuch fine; And

this ſuite muſt be depending: And next of all is added the Kings Court, for ſuch fines as by Cuſtome may be levied in Courts of ancient *Demeſne*, or the like if any be, are not true fines, but ſimilitudinary onely.

Laſtly is added the Kings Court of Common Pleas, for that in ancient times, before the Court of Common Pleas was erected, fines were levied, (as among the old Records thereof appeareth) in any of the Kings great Courts of Law; But after the erection of the ſaid Court, becauſe fines are levied upon *Original Writs* that are *Common Pleas*, and therefore onely to bee dealt withall in that Court, fines are and ought to bee levied in that Court onely.

I may deſcribe a fine ſhorter thus out of *Glanvills* words;

Finis eſt amicabilis compoſitio & finalis Concordia, ex licentia terminans loquelas motos in Curia: for his very words are theſe: *Contingit autem aliquando loquelas motas in Curia Domini Regis per amicabilem compoſitionem & finalem Concordiam terminari, ſed ex licentia Regis vel ejus Iuſticiariorum.*

Theſe like Concords have beene in uſe in the Civill Lawes, and are called by them Tranſactions; whereof they ſay thus, *Tranſactiones ſunt de eis quæ in controverſia ſunt, à lite futura aut pendente ad certam compoſitionem reducuntur, dando aliquid vel accipiendo.*

Or ſhorter thus; *Tranſactio eſt de re dubia & lite ancipite mutuum ad finem ducta, non gratuita pactio.*

Where

Where note that it may well be ſaid *non gratuita Pactio*, becauſe in the end of the concord of the fine, which is the forme thereof, there is contained a certaine ſumme of money under this forme, *Et pro hoc fine habendo, &c. I. S.* the cognizee *dedit* 20. *li. ſterlinguorum.* So likewiſe there is mony paid unto the King, which is called the Kings Silver, *pro licentia concordandi.*

Thus much have I adde out of the Civill Law, That the Student might as well in this, as in many other Titles of the Law obſerve the great conformity that is betweene the Common Law of the Land, and the Civill Law of the Empire.

If I ſhould define *Homage*, I may ſay, That *Homage* is a ſervice corporall of moſt reverence done by the Tenant unto his Lord, whereby hee doth acknowledge himſelfe to become his man, and to doe him all earthly honor. *Homagium quid?*

Where *Service* is the *Genus*, or moſt generall word, limited by the word corporall, to diſtinguiſh from other ſervices not corporall, for, that it is to bee done by the Tenant himſelfe in perſon and by none other to the Lord: All thoſe words that follow in the ſaid deſcription are added in ſtead of the difference drawne from the forme and manner of the performance of the ſaid *Service*.

Bracton hath a larger deſcription hereof, taken from the effects proceeding on both ſides, thus; *Homagium eſt Iuris vinculum, quo quis tenetur & aſtringitur ad warrantizandum, defendendum, & acquietandum tenentem ſuum in ſeſina ſua, verſus omnes*

per certum servitium in donatione nominatum & expressum, & etiã vice versa; Quo tenens re obligatur & astringitur ad fidem domino suo servandum, & servitium debitum faciendum. And after setteth downe the forme and manner of doing thereof. The *Feudists* in the Civill Law, doe render it shorter thus; *Homagium seu hominium (hac enim vox communior est) est veneratio (si vim verbi stricte consideramus) cùm se eo nomine hominem, id est, Clientem ipsius fore profitetur.*

Estate in Dower, quid? If likewise I should yeeld a generall description of an estate in *Dower*, which might agree to all the severall kinds of *Dower* by *Littleton*, I would describe it thus:

An estate in *Dower* is an estate of Freehold during the life of a lawfull wife, appointed out of an inheritance whereof she is dowable, which estate beginneth upon and after the death of her husband for her maintenance.

The Generall of this description is an estate of Freehold during the life of a lawfull wife. There is added, appointed; for that an estate in dower
1 is appointed two manner of wayes; First, either by act of Law, as a gift of the Law upon a lawfull mariage, as is the Estate in Dower at Common Law, of the third part to bee assigned by metes, and bounds by the Law, and generall custome of
2 the Realme: Or else of more, as of the moity, &c. according to the custome of the particular place.

It is said moreover, lawfull wife, for except the wife be a lawfull wife, and the mariage a lawfull

full mariage, *Dower* cannot be had, for the estate in *Dower* is in regard of the mariage.

The second way, That Dower is appointed, is by act of the partie, and that is, either at the mariage at the Church doore, when they come to be maried, and therefore called Dower *ad ostium Ecclesiæ*; or by consent of the Father, or other Ancestor of the husband, and therefore commonly called Dower *ex assensu Patris, &c.* But both these Dowers are almost worne out of use. 2. Way.

These words (after the death of her husband, for her maintenance,) doe containe the finall cause and purpose wherefore it was put in use.

Dower by the course of the Common Law, which is the most usuall kinde of Dower, may in this manner be described.

An estate in Dower by the course of the Common Law, is an estate of Freehold for the life of a lawfull wife, of the third part of all those inheritances dowable, whereof the husband was seised of an estate of inheritance, during the Coverture, given by the Law to be compleat after the death of the husband, for her maintenance.

This description is drawne from all the causes: the *Materiall* cause is set forth unto us by the persons; the husband and wife; the forme is the estate of freehold for the life of the lawfull wife. The efficient causes are, The Act of the Law, and likewise the seisin of the husband during the Coverture, and lastly, to be compleat after the death of her husband; And the finall cause in these words, for her maintenance.

So

So that by lawfull mariage the eſtate in *Dower* hath commencement by the ſeiſin of the huſband during the Coverture it hath his progreſſion, and by the death of the huſband his conſummation, and accompliſhment, whereof enſue the three maine barres to be pleaded by the Tenant of the land in a writ of dower.

3. *Barres.*

1 The firſt againſt the mariage, *ne vnques loyalment accoople*, wᵗʰ plea is triable by the Ordinary.

2 Againſt the Seiſin, *ne unques ſeiſe, &c.* tryable by a Iury.

3 And againſt the conſummation, that the huſband is yet living, which is triable onely by prooſes of witneſſes.

Although the Civill Law doe call that Portion which is brought by the wife, or given with the wife in mariage (which we commonly call the mariage portion) *Dos*, her *Dower*: And they call the eſtate in Dower, *Donatio propter nuptias*, yet have they this agreement or conformity, *quod neuter ſine matrimonio eſſe poteſt.*

And becauſe wee have had occaſion to ſpeake of mariage, let us here define or deſcribe the ſame, *Bracton* out of the Common Law thus deſcribeth it, *Matrimonium eſt conjunctio viri & mulieris individuam vitæ conſuetudinem retinens.*

Bract. lib. 4. f. 298. b. Lib. 5. f. 420.

Britton thus: *Matrimonie eſt aſſemblie, de home & de feme, a lour deux volunts, per joynture de St. Egliſe, per demurrer enſemble come un chaire à touts lour vies ſans eſpoier de departure.*

Britton 246.

The Civill Law hath it in this manner: *Matrimonium eſt divini & humani juris communicatio, inter*

Inſtitu. de Patria: Poteſt.

ter virum & fœminam, individuam vitæ consuetudinem continens.

The definition of Mariage which *Strigelius* so much commendeth, whereby all the difficulties that fall in debate concerning Mariage, may be (as he thinketh) determined, is in this manner conceived.

Conjugium est unius mariti & unius fœminæ, legitima & indissolubilis copulatio, à Deo instituta in Paradiso, ut intelligamus Deum esse castum & castitatis amantem, ut ei in castitate serviamus, & ut hoc modo & non aliter propagetur genus humanum. Kickerm.

A Rent may be thus described: A rent is a Revenue issuing out of lands or other manuall hereditaments, and wherewith the same is charged for a time of continuance. *Rent, quid?*

So that the *genus* is Revenue, and the materiall subject that supporteth the charge, is manuall hereditaments, as land and such like, for out of no other hereditament can a rent bee properly reserved or granted: and the peculiar difference is wherewith the same is charged, for a Rent is a charge, and whersoever the land be conveyed, *transit cum suo onere*, it goeth with his charge.

So that a certaine summe of money, or other things valuable (for a rent may bee reserved or granted of other things than money) are the matter *de qua*; Land, or other manuall hereditaments the matter *ex qua*, or *extra quam*: The reservation or the grant, the *efficient cause*: The finall cause might also have beene expressed, but when the definition is otherwise plaine, it needeth not.

Le.5.ff. non possim. ff. de rebus eorum.

The Civill Law by this word *Redditus*, or *Reditus*, understandeth generally *Quicquid ex re aliqua obvenit aut redit.*

And becauſe a Rent ſervice hath his originall by way of reſervation, let us here ſee what a Reſervation is.

Reſervation quid?

Com. Browning 140.b. 35.H.8.57.a

A Reſervation is an agreement betweene the Lord and Tenant, or the Leſſor and Leſſee, that the Lord or Leſſor ſhall receive at times appointed a certaine ſumme of money or other thing appointed to bee payd for the thing demiſed or granted.

Reliefe quid?

A Reliefe, called in Latine *Releviũ*, The *Feudiſts* deſcribe or define thus: *Releviũ dicitur honorariũ, quod novus vaſſallus Patrono introitus cauſa largitur, quaſi morte alterius vaſſalli, vel alio quo caſu feudum ceciderit quod jam à novo ſublevetur, veteres introitum appellabant.*

Bracton lib.2 fo.83.

Of a Reliefe *Bracton* hath theſe words, *Oportet ſtatim quod tenementum, quod fuit in manibus anteceſſorum, & hæreditas quæ jacens fuit per eorum deceſſum relevetur in manus hæredum, & propter talem relevationem facienda erit ab hæredibus quædam præſtatio quæ dicitur Relevium.* Out of which words of his, a deſcription of a *reliefe* may thus be framed:

Relevium eſt quædam Præſtatio, facta ab hæredibus poſt mortem anteceſſoris ad relevandam hæreditatem per eorum mortem jacentem.

Where he ſeemeth to uſe *hæreditas jacens* for land, &c. deſcended to the heyre before his entry, as the Civilians likewiſe take the ſame.

Iudgement quid?

A Iudgement is the determination of a cauſe in

in controverſie by a perſon thereunto appointed.

This Deſcription is generall, and comprehendeth all manner of Iudgements whatſoever: The Civilians doe thus render the ſame: *Iudicium eſt actus legitimus, quo Iudex de cauſa propoſita cognoſcit, & ſecundum æquum & bonum pronunciat.* Wherein they note to be three degrees: Firſt, the Cognizance or power to judge. Secondly, that this Iudgement bee publike or publiſhed. Thirdly, that it bee juſt and right. This connexion they yeeld to be thus; *Siquidem in nullo controverſiarum genere prodeſt cauſam differri ad Iudicem, niſi cognoſcatur de ea, ſic nihil profuerit eſſe cognitum niſi pronuncietur; denique, pronunciatum inutile erit niſi ex bono & æquo procedat.*

There are ſundry kindes of Iudgements, ſometimes diverſified in reſpect of place, ſometimes in reſpect of the perſon that judgeth, ſometime in reſpect of the manner of proceeding. In reſpect of the place, as in a Court of Iuſtice, and then every Iudgement is ſaid to be the Act of the Court: ſometimes Iudgement given out of Court, as upon the voluntary ſubmiſſion of the parties in controverſie, as an award or arbitriment: with the deſcriptions of which I will end this part of our diſcourſe touching *Definitions* and *Deſcriptions*.

Arbitriment quid?

An Arbitriment, which is alſo called an award, is a Iudgement or Determination which one or more doe make at the requeſt of two parties at the leaſt, for or concerning debt, treſpaſſe, or other controverſie had betweene the ſaid parties.

The Civill Law yeeldeth it thus: *Arbitrium*

est arbitri sententia, sive Iudicium inter controvertentes, privato consensu, non autem publica intervenient authoritate.

But to the intent the Student may know how to collect a definition or description of any legall part or title out of his bookes of Report, I will leave him here a description of an Award or Arbitriment, where every part is drawne and deduced out of sundry Law Cases here and there scattred, which I have gathered as sundry dispersed stones into one building.

An Arbitriment is a Iudgement, 8.E.4.1.a. 8.E.4.10.a. 21.E.4.39.a. *given by such person or persons as are elected by the parties to the controversies,* 9.E.4.43.b. 16.E.4.9.a. *for the pacifying of the said controversie,* 8.E.4.10.a. 19.H.6.37.b. *Askew; according to the compromise and submission,* 19.E.4.1.a. *and agreeable to reason and good conscience.*

All which words composing the said description, are deduced and drawne out of the bookes cited, and one [illegible] by me laid together, and what is done here concerning an Arbitriment (of which hereafter I shall make a larger discourse) may be likewise performed in sundry other Titles.

Ob. There resteth an *Objection* to be removed; it is said by the ancient *Roman Lawyer Iabolenus, Omnis definitio in Iure Civili periculosa est, parum est enim ut non subverti possit:* To define in Law is difficult, and the sundry circumstances of things be so many, and so full of variety, as the definition or description is happily made if it stand or remaine unimpeached.

To

To this I give anſwer, That all this is in a manner true; but let us remember, *Difficilia quæ pulchra*, and uſe ſo much the more care and diligence in the compoſition of the ſame. Albeit the Interpretors doe underſtand him to meane by a Definition in that place, no other thing than a Rule or Ground in Law, yet nevertheleſſe both are neceſſarily attempted and performed ſufficiently: For otherwiſe the knowledge of the Law would be but an incertaine, inconſtant, and tumultuary knowledge (if that may be called knowledge at all, but grounded upon wavering opinions,) but the knowledge of the Law is not ſuch, as ſhall be evidently made manifeſt when we come to diſpute, whether the Law may be reduced into a method or no. *Reſp.*

Thus much of *Definitions* and *Deſcriptions*, there followeth in order the conſideration of *Diviſions*.

Some there are which to avoid confuſion because they conceipt the word *Diviſion* to containe ſeverall ſignifications not reducible under an univocall head, they have therefore even divided *Diviſion* it ſelfe, in bringing in the conſideration of the name into his ſundry ſignifications, which they call *diviſio nominis*, and which they deſcribe thus: *Diviſio, quid*

Diviſio nominis eſt oratio qua vox in ſua ſignificata diſtinguitur.

But becauſe that were ſomewhat improper, and that more fit place will be found hereafter in the

ſecond part of this Treatiſe to handle the ſame, I will deale onely with thoſe *Diviſions* that are of the thing, *Diviſionis rei*, Diviſions of materiall parts.

Diviſio rei, & totius per partes reſolutio, and it is either *Principalis, vel minùs Principalis.*

Principalis eſt qua totum propriè & principaliter dividitur; & eſt vel generis in ſpecies, qua eſt diviſio totius univerſalis, vel eſt totius eſſentialis, in ſuas partes eſſentiales, ut homo dividitur in corpus & animam; vel eſt diviſio totius integralis, in ſuas partes integrales. So that of this kinde of diviſion as you ſee there are three ſorts.

1 *Diviſio generis eſt qua genus dividitur in ſuas ſpecies:* and this kinde of diviſion is called of ſome *Diviſio totius ſubordinantis.*

And ſo *Ius*, as it ſignifieth the law, is divided by *Bracton in Publicum & Privatum*, and of this kinde of diviſion we have examples in the Law; as *Littleton* when he divideth an eſtate of *Inheritance* into an eſtate of *Fee Simple*, and an *Eſtate Tayle:* when he divideth an eſtate of *Freehold* into an eſtate of *Inheritance*, or an *eſtate for life:* So likewiſe he divideth an eſtate for life, either for *the life of the partie, Ou pur auter vie:* an eſtate for *life of the party* is either by act of Law, as that of *Tenant in Dower, Tenant by the Curteſie*, and *Tenant apres poſsibility of iſſue extinct.*

2 By act of the party, as the *generall eſtate* for life, which hath his originall by Demiſe and limitation of the partie.

Of this kinde of diviſion ſpeaketh *Melanction.*

Diviſio

Diviſio, generis in ſpecies eſt omnium præſtantiſſima & in omnibus artibus communiſſima.

And here ſome doe require *Cum differentiæ exactæ haberi poſſint per duas tantùm dividatur, quæ Dichotomia dicitur.*

And of this alſo they have made theſe three obſervations:

1. *Placuit omnem diviſionem duabus differentiis è diverſo poſitis perfici deberi.*

2. *Vt ita repugnent iſtæ differentiæ ut nequaquam in idem convenire poſſint.*

3. *Poſtremo, ut quicquid in genere continetur, id totum differentiæ explicent.*

Of this *Dichotomia* ſo much extolled by *Ramus*, and too curiouſly obſerved by his followers, occaſion was taken by *Ariſtotle* out of *Plato* as it ſeemeth, and appeareth, *lib.* 1. *De partibus animalium, cap.* 2. & 3.

But as touching the ſame I am of his minde which affirmeth, *Nobis ſicut primum eſſet, & voto forſitan optandum, ut legitimis duabus differentiis dividerimus; ita proximum erit ut quibuſcunque duabus (tamen ſin minus poterimus duabus,) at quotcunque poterimus dividamus, dummodo univerſam ejus quod dividitur complectamur latitudinem:* And although it be true that *Peripatetici ſemper dicotomiam probarunt, tamen non ανάγκῃ & abſolutè, ſed κατὰ τὸ πλεῖον*, and therfore we may not be tyed or reſtrained to make our diviſion alwaies of two parts; but where that cannot conveniently be brought to paſſe, we may divide into ſo many parts as the nature of the thing ſhall require. And therefore *Littleton* in

in his diuision of Rents, diuides them into three kindes; *a Rent Service, a Rent Charge, a Rent Secke*, which is very good and sufficient.

And so of a *Warranty*, where he divideth every *Warranty* either into a *Lineall Warranty, a Collaterall Warranty*, or a *Warranty commencing by disseisin*.

So likewise every estate in *Dower* is either by the Law, which is the generall Custome of the Realme, and is of the third part; or else by the peculiar custome of the place, as of the moity in *Gavelkinde*, or more or lesse as the custome of the place shall warrant: or else thirdly, by assignation of the party, and that is twofold, either by the husband himselfe, *ad ostium Ecclesiæ*, or else by the Ancestor, as *Ex assensu patris*; or, *De la pluis beale, &c.*

So likewise we divide the Materiall Church or Temple, the place appointed for divine Service into three kindes; a Church Cathedrall, which is the seat of the Bishop, and his Chaire: secondly, a Church Collegiate or Conventuall: and thirdly, a Church Parochiall.

So likewise we divide Tithes in this manner: all Tithes are either *Prædiall, Personall*, or *Mixt*.

So a division of foure or more parts is to bee admitted, if the nature of the thing divided doe so require: as *Littleton* importeth in this division of Actions.

All Actions are either reall Actions, Personall actions or mixt actions; and this Division is ordinary and almost every where in our Bookes. *Littleton*

tleton ſeemeth to adde a fourth member, when he ſaith, that when a man releaſeth all actions, Reall, Perſonall, and mixt, that this is no Barre in an Appeale, and yet a releaſe of all actions ſufficeth; he intimateth thereby that there is an Action, neither Reall, Perſonall or Mixt, and yet an Action, as the Appeale, an Action of Reuenge.

And herein I would not wiſh; That for *Dicotumy* ſake, the Student ſhould frame Diviſions of his owne head, and labour to reduce them *ad bimembrem Diviſionem*, as ſome have done; But accept rather thoſe that are approved of Authors, and generally received in that Art. And herein let me obſerve by the way that *Dicotumia* or the twofold diviſion, *Si pariat multas ſubdiviſiones, intellectui & memoriæ aggerendas eſt vitioſa.*

Likewiſe *Διανομὴ vbi alterum membrum eſt poſitivum, alterum negativum, non eſt bona.*

In hac diviſionis ſpecie obſervandum eſt, ne id quod ſecundum magis & minus dividitur, in ſpecies dividi arbitremur.

And thus much *de diviſione totius univerſalis.*

Diviſio totius eſſentialis eſt qua totum eſſentiale in ſuas partes dividitur, ut in materiam & formam, & dicitur diviſio totius coordinati.

Diviſio totius integri eſt qua aliquid in ſua membra, ſeu partes integrales dividitur, & dicitur Partitio; Et eſt nihil aliud quam membrorum quæ ad integritatem totius requiruntur, enumeratio: As when we doe divide a houſe into the ſoyle whereon it ſtandeth, and the edifice and ſtructure thereof.

So the Author of the Dialogues betweene the

Doctor and the Student divideth the Law in generall into the Law of Nature, the Law of Nations, the Law of God, the Law of particular Kingdomes, as the Civill Law, the Law of this Land.

So also have the Civiliãs divided their law thus; *Ius Civile est quod legibus Plebiscitis, Senatus consultis, Principum placitis, Magistratuum Edicti is Responsis, Prudentium constat.*

So doe we likewise divide the Law of *England* into the Common Law, and Statute Law.

So we distinguish and divide a Mannor into Demesnes and services.

And a Rectory into Glebe and Tithes.

We are now come to the second Principall Branch which is of the lesse principall Divisions.

Divisio minus Principalis, est qua dividitur totum impropriè dictum, ut 1. *Causa per suos effectus,* 2. *Effectus per suas causas,* 3. *Subjectum per sua accidentia,* 4. *Accidentia per sua subjecta,* 5. *accidentia per accidentia,* 6. *res per sua objecta, adjuncta,* 7. *quando, per circumstantias loci, temporis.*

Common. Wee often make Divisions in the Law by the causes, as *Bracton* doth divide a Common thus by the causes: First materiall, as of those profits whereof Common may be had; as Common of *Estovers*, to burne in their houses; Common of Pasture, for feed for their Cattle; Common to digge in the soile of another; *scilicet, fodiendo, ut lapides, cretam, arenam, turbam, id est,* Common of Turbary and such like; and likewise there is a Common

Common of fiſhing called Common of Piſcary.

In reſpect of the forme and manner, how a Common is divided, thus; Every Common is either, Common appendant, Common appertenant, Common *per caſe de vicinage*, or Common in groſſe.

In reſpect of the efficient cauſe, a Common is divided thus, as all Commons are either by preſcription, or elſe by grant: Commons by preſcription are ſuch as Antiquity of time, and long continuance have produced, as Common Appendant, Common *per caſe de vicinage*.

Commons that have had their originall by the grant of the Parties are either ſo granted as that the ſame is reſtrained to the beaſts paſturing ſuch lands; And ſo it may be called a Common appertenant, although improperly by Grant; or elſe a Common in groſſe, and that in ſuch liberty or manner of reſtraint of benefit as pleaſeth the Grantor to beſtow.

In reſpect of the circumſtance of time, ſome Comons are for all times of the yeere, ſome others for a certaine time onely.

In reſpect of the place, ſome Commons are in the Waſte of the Lord, or by eſpeciall grant through all his Land, or in his ſeverall, or *ubicunq; averia ſua iverint*.

In Common of Paſture *Bracton* conſidereth theſe things; either the word paſture is taken largely, *de omni quod edi poterit, vel paſci, largè ſumpto vocabulo, ut ſi quis habeat in alicujus terra communiam paſturæ, ſcilicet, herbagij, Peſſonij, ſive*

glandis, aut nucum, aut quicquid ſuo nomine Peſſonj continetur, item foliorum & frondium.

So I may divide Conditions annexed to Contracts, or to eſtates in this manner.

Conditions. All Conditions are either conditions in fact, or in Law; Conditions in fact are either expreſſed in words, and ſo created by words conditionall, or elſe they are implyed, namely, conditions by implication.

Conditions expreſſed are either poſſible or impoſſible to be performed, and then are thoſe conditions void in Law, for, *nemo tenetur ad impoſſibilia*; All poſſible conditions are ſuch as may bee either againſt the Law, and that either againſt the Common Law, and then not onely the Condition, but the whole Contract is voyd; But if it bee onely contrary to a Statute Law which may bee diſpenſed wiathll, then the Condition ſtandeth good; and the partie bound thereby is likewiſe bound to procure a diſpenſation, and make himſelfe able to performe the ſame.

A Condition lawfull is either ſubſequent, or precedent; ſubſequent Conditions annexed to eſtates, doe either upon performance enlarge the ſame, or upon breach diminiſh or make voyd the ſame.

Conditions repugnant are ſuch as are limited, repugnant to the premiſes, as land given in Feeſimple by a common perſon upon a condition that he, nor his heires ſhould alien. This is a repugnant Condition to the ampleneſſe of the eſtate, and therefore voyd.

In

In like manner I might divide a Custome by the causes, as the internall causes are the matter and forme; The materiall parts may be the persons whom the custome concerneth; The place and proceedings in Courts of Iustice; For every Court of Iustice hath his Customes and courses of proceedings sometime different from others. *Customes.*

In respect of their forme, they are either generall throughout all the Realme, and so doe they constitute that part of the Common Law which is grounded upon the generall Custome of the Realme.

Or else they are particular Customes to certaine places, of the which *Bracton* saith thus; *Habent Anglici plurima de consuetudine, quæ non habent ex lege, sicut in diversis Comitatibus, Civitatibus, Burgis & Villis, ubi semper erit inquirendum, quæ sit loci illius consuetudo, & qualiter utantur consuetudine.*

Every speciall Custome, as touching the forme thereof, because it bindeth as a Law, and is as a peculiar Law of the place, hath two things considerable, First, the place; secondly, the manner and use of it. As concerning the place, every particular custome ought to bee bounded within the compasse of particular places, as sometime through a whole County or the greatest part thereof, as *Gavell kinde* in *Kent*: or within a Citie, Borough or Towne, as *Borough English*: For a particular custome cannot be at large in places uplandish.

Secondly, as touching the forme and manner of use of it, it ought to bee reasonable and agree-

Littl.l.c. 14.*E.*3.*f.* *Barr.* 277. 42.*E.*3.*f.* *avowry* 66. 14.*H.*4.*f.* *avow.*60. 2.*H.*4.24.*b.* 5.*H.*7.9.

able to common right without absurdity, for the which a particular reason may bee yeelded and given.

Hence ensueth, That it ought to bee without prejudice to any, and not to bee injust in it selfe, 42.*E.*3.*f. avow.* 66. 35.*H.*6.29.*b. Fitzh. Custome* 2.

Secondly, it ought to be certaine, 13.*E.*3.*f. dum fuit infra atatem.* 3. 22.*H.*6.46.47.

Thirdly, it ought to be alleaged in the affirmative; for a negative Allegation is not perfect, 8.*H.* 6. 4.*a.*

Efficient causes of a Custome are two; *longe vi temporis usus*, That is, commencement without notice of the originall when it begun, which they utter in these words; *Temps dont Memorie ne court* as *Littleton* speaketh; and secondly, continuance without notable interruption: 8.*H.* 6. 4. *b.* 22.*E.*4.8.*b.* 35.*H.*6.*f.Custome* 2. 13.*E.*3.*f. Prascript*, 40. 21.*H.*7.20.*a.b.*

The finall cause is the effect, that it binds like a Law, for, in things of this nature, the finall cause and the effect are all one: hereof *Bracton* speaketh, *Consuetudo quando pro lege observatur in partibus ubi fuerit more utentium approbata est vicem legis obtinet.* And againe, *Longævi temporis usus, non est vilis authoritas, Bracton lib.* 1.*cap.* 3.*f.* 2. Hence is it said, That a custome ought to be compullary, 42.*E.*3.*f. Avow.* 665. 5.*H* 7.9.

I will here adde something out of the Civill and Cannon Lawes touching a Custome, wherby the Student may observe the conformity of both

both ſtudies, and conjoyne them if he liſt together; that one of them may aſſiſt, give light, and ornament unto the other.

Firſt, where it was ſaid, That a Generall Cuſtome is a parcell of the Lawes of the Realme; They likewiſe affirme, that *Conſuetudo generalis facit jus commune; Clem. Fin. de ætate & qualita:* And againe, *Conſuetudo tanti temporis cujus initium non continetur in hominum memoria, habet vim Privilegij Imperialis Le: ℈: ductus aquæ de aqua quotidiana.*

Againe, *Conſuetudo eſt jus moribus (id eſt) aſſiduis actibus introductum. C. Conſue. i. Diſtinctio, voluntas Populi rebus ipſis & factis declarata. Tacitus conſenſus omnium. Le. de quibus: ff. de legibus. Tacita civium Conventio. Ius ſcripto non comprehenſum.*

For the effect thereof, *Conſuetudo legem imitatur ℈ ex non ſcriptis Inſtitutis, de Iure naturali gentium & Civili: Legem imitari dixit, id eſt, tantundem præſtare & quaſi legem repræſentare Aldobe: ibid.*

Conſuetudinis vero officium eſt primo ut confirmet, deinde ut interpretetur ſcriptam legem ſi obſcura ſit: in Le; minimè Paulus, & Caliſtratus in leg. de interpretatione, ff. de legibus: with divers like, too long here to make repetition.

Sundry other examples of diviſion might bee produced out of the Lawes of this Reame, which argue the neceſſary and frequent uſe of Diviſion; but to omit them leſt I ſhould bee too tedious, and to leave the ſtudent to his owne induſtrious Collection, I will commemorate and inſert here ſome few precepts to be obſerved in the making of an uſeful diviſion, and after ſhew the benefit of this

this knowledge, and ſo relinquiſh the ſame.

The precepts therefore may bee drawne into two heads; The firſt in reſpect of the thing to be divided, namely, *diviſum* or *dividendum*; The ſecond in reſpect of *membra dividentia* the parts dividing.

As touching the things to be divided, it is to be obſerved, that Diviſion is not alwayes neceſſary; for ſome things are ſo entire as they cannot be divided, as *unitas*, for if it bee divided, it is no more unity, but multiplicity.

So inſtance which is neither time paſt, nor time to come, but onely the moment of time preſent, unto the which the parts of time paſt and future, are conjoyned.

Many things in their nature are intire in the conſideration of our Lawes, for Entierty is that *quod in partes dividi non poteſt*, I meane the diviſion of *totius integralis*, not *totius univerſalis*. And therefore Entierties are of two kinds; Firſt, ſome are ſuch as by nature ſuffer no diviſion, as the things before ſpoken of, Vnity, Inſtance, Corporall ſervice, of which it is ſaid, *ea quæ in partes dividi non poſſunt, ſolida à ſingulis hæredibus debentur*, as fealty and ſuch like ſervices, of which nevertheleſſe ſome certaine ones are appointed by Statute, to avoyd trouble, to bee performed by the eldeſt coheire, for the reſt as Homage.

2.E.2.f. avo. 179.

Other things are ſaid to bee entire, which although they may bee divided into parts by their nature, that is, their nature and eſſence is not repugnant to a *Diviſion*, yet the Law will permit

no

no diviſion of them by the act of the party, although by act in Law they doe abide Diviſion, and ſuch is a *Rent Charge*, a *Warranty*, a *Condition*, &c.

As touching the parts dividing, or *membra dividentia*, the firſt rule is, that *Membra dividentia conveniunt cum toto & ſunt toti adæquata, ita ut omnia membra ſimul ſumpta ſunt ſuo diviſo æqualia, & quod nihil contineatur ſub diviſo quod non ſub aliquo membro, nec aliquod membrum quod non ſit ſub diviſo.* Reg. 1.

The ſecond rule is, *Quod membra dividentia ſunt à ſe invicem diſjuncta, diverſa, contradiviſa & non ſubalterna, id eſt, quod unum in altero non contineatur.* 2

The third precept is, *Quod ſingula membra per ſe ſumpta ſunt inferiora diviſo*, contained within the amplitude of the thing divided, the parts being taken ſingularly and alone. 3

The fourth rule is, That the parts and members dividing be *proxima & immediata*, next and immediate under that which is divided, and not fetched afarre off, which precept is taken out of *Ariſtotle*, 2. *Poſt.ca.*5.& 14. 4 *Ariſt.*2. *Poſt.* *cap.*5. & 14.

The fift rule is, that *Diviſio inſtruatur membris quam per naturam fieri poteſt paucißimis*: The reaſon whereof is aſſigned thus, *Cum diviſio rei maxiſeſtandæ gratia inventa ſit, ſi multa contineret membra faſtidium potius & obſcuritatem quàm cognitionem pararet.* And therefore it is *Plato* his Precept in his *Politico*, *Noneſt tutum, ô amice, in minutißima redigere.* And therefore *Seneca* ſaid well, *Simile eſt confuſo quicquid in pulverem uſque ſectum fuerit, nam* 5

ut maxima comprehendere, ita in minima deducere difficile est.

6 The fixt and last precept is, *Quod membra dividentia quendam ordinem inter se habeant, & quod divisio omni ambiguitate & obscuritate vacet.*

And thus much concerning the Precepts of artificiall Division may suffice.

As touching the use of Division, *Plato* in his *Dialogues, Phedrus* and *Sophista*, falleth into a large praise thereof, and in the person of *Socrates* affirmeth, *Si nactus fuerit Ducem qui recte partiri sciat se ipsius tanquam Dei vestigia sequuturũ esse.* Whereof also *Quintilian* hath these words, *Vt vasculaorũ anguſti respuunt superfluam humoris copiam, tamen paulatim instillando replentur, sic distributio si in partes, accipiuntur facilius, ut cibus mansus, citius ac facilius digeritur.*

Boetius in his book which he wrote *de divisione*, thus speaketh, *Scientia dividendi omnibus studiosis magnum fructum adfert, ut qua facit ut res clarè à nobis tractari queat.*

In a word, the utilities thereof may be reduced thus, *Primò, quòd faciat ad rei cognitionem distinctam & evolutam: Secundò, quòd prosit ad prædicata essentialia venanda, id est, ad investigandum genus & differentiam: Tertio, ad recte ordinandas & methodice disponendas disciplinas.* *Arist. 2. Post. Com. 74.*

Another hath these words, *Divisio perfecta est principium intelligendi & constituendi rerum & disciplinarum methodos.*

But

But to leave these Philosophers, and to behold what the Civill Lawyers affirme thereof, and amongst much this may suffice, *Per divisionem materia melius intelligitur & facilius capitur: Le. 1. juncta gloss. ff. de dolo malo.* And againe, *Est autem divisio innumerabilis quasi materia brevis compositio quæ ad multa facit: Gloss. Instit oblig. ℣. Olim autem in verbo divisio.*

But to let these also to passe, I will conclude with that of *Bracton*, although mentioned before, *Lib. 1. cap. 1. Divisio sive partitio animum legentis incitat, mentem intelligentia præparat, & memoriam artificiosè reformat.*

Thus having in this manner ended with Definition or Description, and with Division in such a summary fashion as I conceived most convenient for the capacity of the Student, and especially how to informe him to make use of these parts as well in the study of the Law, as in any other his studies, leaving the exact knowledge thereof unto the Logicke Schoole: I thought it good here to advertise you, that there may be nevertheless observed of this which hath beene said concerning the premises, That the knowledge of Definition, Description, and Division, doe presuppose the knowledge of the five Predicables handled by *Porphyries Institution* to *Aristotles Organon*, for whatsoever is properly defined, described, or divided, is *species*, as hath beene already said. And the true parts of every perfect Definition are *genus* and *differentia*; and of Description, *Genus vel*

aliquod loco generis, Differentia vel aliquod loco differentiæ, Proprium & Accidens tanquam partes descriptionis dicuntur.

Likewise is presupposed the knowledge of the *Antepredicaments*: for *Æquivocum* or *Analogon* denoting words of many significations, cannot bee defined or described so standing, but must first be distinguished into their sundry significations, *Vt certum sit id quod definiatur aut describatur*: For nothing indeed may bee defined or described, but that which is *univocum*.

Also by the knowledge had *de nominativis*, the thing is knowne in *concreto* as well as in *abstracto*: which is very necessary in Descriptions, and many times in use: As *Littleton* in the first Chapter of his Booke, in his Treatise of Fee simple. But because he writeth a booke of Tenures, which is the chiefe drift of that booke, he thought it better to tell you who was a Tenant in Fee simple, than to describe the state alone; for in so doing it was more sutable and answerable to his Treatise in hand, namely, of Tenures and their incidents rather to deale with the Tenant than the estate, yet so as that thereby the estate is likewise sufficiently knowne. The like he performed in the rest of his Chapters, as of Tenant in Taile, Tenant in Dower, Tenant for Life, and the rest. Also the knowledge of the Predicaments and Post-predicaments is likewise presupposed. And as touching the Predicaments it is evident that the *genus* or *differentia* of every thing defined, described or divided, are to be sought in their proper and peculiar Predicaments.

As

As concerning the Poſt-predicaments, how many they are in number, and how many are needfull for this knowledge, may well bee made manifeſt by ſome examples, and the uſe of them in the Lawes.

Ariſtotle maketh foure kindes of *Oppoſites*; firſt, thoſe that are *relativè oppoſita*, as the huſband and the wife, the father and the ſonne, the maſter and the ſervant, of which conſiſteth the eſtate *Oeconomicall* of every family and houſhold. So likewiſe the King and his Subjects, the Magiſtrate and the People, of which conſiſteth the eſtate *Politicall* of the Kingdome and Common-wealth. So alſo the Lord and his Tenant, in whom anciently ſtood the ſtrength of the Eſtate: the Leſſor and Leſſee, Graunter and Grauntee, Feoffor and Feoffee, Bargainor and Bargaincc, Coniſor and Coniſee, Recoveror and Tenant againſt whom the recovery was had, and ſuch like, in whom and betweene whom all Conveyances and Contracts have their being. So likewiſe in ſuits reall the Demaundant and the Tenant, in ſuits perſonall and mixt the Plaintife and the Defendant, in an Aſſize the Plaintife and Tenant; Actor and *Reus* in criminall cauſes: betweene which perſons all ſuits and proceedings in Law are determined.

32.H.8.3. *Dyer.*

4.El.2,22.1. *Dyer.*

Theſe are all *relativè oppoſita*, and have reference each to other; as one man cannot be properly Plaintife and Defendant in one and the ſelfe ſame action; or *Actor* and *Reus*, except in ſome ſpeciall cauſes onely, as where Interpleader may be admitted, as in a Writ of Detinue, where Garniſhment

3.H.6.18. 20.H.6.28. niſhment is required, there the Defendant is become Actor againſt the Garniſhee.

20.H.6.29. 22.H.6.45.a So in a *Quare impedit*, where the Defendant maketh Title to have a Writ to the Biſhop, the Defendant is become as Actor.

3.H.6.18.a. 22.H.6.45.a In a *Replevin* upon an *Avowry* made, the *Avowant* is become *Actor*.

22.E.4.10.a So in a *Quod ei deforceat*, the Demandant or Plaintife ſhall defend his eſtate againſt ſuch recovery as ſhall be pleaded againſt him, and become Defendant, and may vouch, *Ac ſi eſſet tenens in priori brevi*, by the Statute of *Weſtm.*2.

Some reſemblance of this is found in the Civill Lawes, where it is ſaid, *Actor in tribus iſtis judicijs, familiæ eriſcundæ, communi dividendo, & finium Regundarum, intelligitur, qui ad judicium provocat. Le.* 13.14.*ff. de Iudicijs. li.*2.*§.*3. *& Lex.*44.*§.*5.*ff. familiæ hereſus. l.* 11. *in fine. ff. de Iuriſdict. Le.*20.*finium regundarum. Le.* 37. *in fine. ff. de obligationibus & actionibus.*

2 The ſecond kinde of oppoſites are thoſe which are *contraria*, as right and wrong, ignorance and ſcience; and of theſe ſome are without any *media*, and ſome have their *media*; and of thoſe that have their *media*, ſome are by participation, and ſome by negation, which the Logick Schoole teacheth more at large.

Com.467. Com.247.

3 The third kind of Oppoſites are thoſe that are *privativè oppoſita*, as light and darkneſſe, ſight and blindneſſe, which things ſucceed and deprive one another, where there is a progreſſe from the habit to the privation; but ſeldome or never any re-

turne

turne from the privation to the habit: Villeine and Free are privatives; in prison and at large are *privativa*. Com. 397. a.

The fourth and last kind of Opposites are those which in Propositions and Clausesare *contradicentia*, the one Affirmative and the other Negative; of which expresse and full affirmatives the Law requireth all issues to be joyned tryable by Iurors, that they may not bee inveigled in the tryall of matters in fact. 4

Also the Law of England being more precise in the forme of pleading than any other forreine Law, to the intent the issue and point that commeth to be tryed in matters of fact might be evident and cleare to a Iury, doth require that all affirmative pleading in Barre or defence, to make it the more perspicuous affirmative, should bee averred, that is, an offer made of cleere proofes.

Of Negatives in the Law there are two kindes, as first, meere negations, of which we commonly say; *Negativum nihil implicat*: and there are also *Propositions negative*, which doe imply an affirmative, and those we call Negative pregnants, which we doe refuse in all issues of tryalls by Iurors, except in some cases, where the necessity of the cause doth require the same.

So moreover, *Modi prioris* and *Modi simul*, which *Aristotle* also handleth as *Post-predicaments*, are worthy consideration: For the better understanding whereof, note that *Aristotle* affirmeth that *Prius quatuor modis dicitur*:

Primò, id quod secundum tempus est prius, id est,

prius

prius tempore: So the law of Nature preceded the law of Nations, and the law of Nations preceded the law of every peculiar people, and so the Common Law of this Land preceded the Statute Law, which as occasion was offered, in every Kings reigne had his originall. So in the making of a Deed, there is writing, sealing, and delivery; the writing goeth before sealing, and the sealing before delivery.

2 *Secundo, aliquid est prius ordine Naturæ.* There are many things which are *simul tempore*, where nevertheleſſe there is a Priority and Poſteriority in Nature. As when Tenant for Life doth ſurrender to the Grauntee of the Reverſion, not having attorned to him before, in reſpect of time the included Attornament and Surrender come together, and are wrought at one inſtant, and yet the Attornament is firſt in Nature, and precedeth the Surrender: For the Attornement implyed doth firſt ſettle the Reverſion in the Grauntee, before the Surrender can take place.

So if Leſſee for yeares and he in the reverſion in Fee doe joyne in a Feoffement to a ſtranger, it is firſt the ſurrender of Leſſee for yeares, and after the Feoffement of him in the Reverſion in Nature and operation in Law; and they both are yet performed in reſpect of time *ſimul & ſemel*.

If a man by his laſt Will and Teſtament in the former part thereof, deviſe Lands deviſeable, holden in Socage to *I. S.* in Fee, and afterwards

in

in the latter part of the ſame will, deviſeth a rent out of the ſame land to *Io: No:* in fee, and dieth, by the Deviſors death, the whole Teſtament will take effect at one time But: the Law ſhall adjudge it firſt a deviſe of the rent, and after a deviſe of the land; for in courſe of nature hee that granteth rent out of land, ought to bee owner of the land, and ſo deviſe the rent, and not firſt deviſe away the land, and after deviſe the rent; That were no good conformity.

Tertio, ſecundum ordinem Prius dicitur; This is priority according to conformity of order; So in every writ, men are by the rule of the Regiſter in their writs to hold order in their Demands; For prepoſterous order is diſorder, and deſtroyeth all; for as *Bracton* ſaith, there ought to be *ordinata diſpoſitio*, and this is *Bonum ordinis*, the good of order; *Ordo eſt cujuſlibet rei ſuo loco concinna digeſtio.* 3

Bract. 188. 35. *H.* 6. 13. *b.*

Fourthly and laſtly, *aliquid dicitur prius honore, quod melius eſt & honorabilius eſt, id prius eſt*, and this is called *Prius dignitate*, as a meſuage preceedeth in dignity land arable, and land arable paſture; the whole is more then the parts, the huſband preceedeth the wife, and ſo muſt be placed in all Writs and pleadings. 4

Bract. 316. *f.* 400.

3. *H.* 6. 33. 4. *H.* 6. 3.

Ariſtotle according to the opinion of former Philoſophers, having ſet downe theſe foure kinds of Priorities, addeth of his owne invention a fift, *Qua convertuntur ſecundum eſſendi conſequentiam, & quod alteri quomodo libet cauſa eſt prius natura poſſit.* But this ſeemeth to be but a *ſpecies* of *Prius natura* ſpoken of before.

So alſo is it *de modis ſimul*, for it appeareth by that which hath beene ſaid, that *quædam* are *ſimul tempore, quorum generatio eſt in eodem tempore, neutrum enim eorum neque prius, neque poſterius eſt tempore.*

Quædam ſunt ſimul natura, as are all *Relativa* and *Correlativa*, all thoſe that are *relativè oppoſita*. Againe, they are thirdly alſo *ſimul natura*, which are *ſpecies ejuſdem generis*; But of this I will ſurceaſe, and ſpeake onely of ſome few things that remaine, which further the knowledge of Definition and Diviſion.

For as much as Diviſion is *totius in partes diſtributio*, it ſhall bee neceſſary to conſider the nature of the whole, *totum eſt quod ex partibus conſtat*. And ſome there are which have divided the conſideration of the whole into theſe parts; There is

Coke lib. 11. 50. *a.* *totum univerſale, totum eſſentiale, totum integrale, totum in quantitate, totum in modo, totum in loco, totum in tempore.*

But for theſe latter foure, ſince they doe undergoe *nomen totius* improperly, and are uſed to draw reaſons in Topicall inventions, and not uſefull to Diviſions, I let them paſſe, and ſhall therefore retaine onely the uſuall conſideration of the three former.

1 *Totum univerſale* is that *quod in ſpecies ſubjectivas dividi poteſt*, as when a *Rent* is divided into a Rent-ſervice, a rent Charge, and a rent Secke.

An eſtate of Inheritance divided into an eſtate of Fee ſimple, and an eſtate in Taile ſo that Inheritance is *totum univerſale*.

Totum

Totum eſſentiale is when the whole is divided into the matter and forme, *Sic itaque materia & forma hic induunt rationem partium*; As Man is divided into theſe eſſentiall parts, the body and ſoule, and of this kinde we have no great uſe in the Law. 2

The third is *totum integrale*, whereof we have more frequent uſe, when the whole is divided into the integrall parts, whereof it conſiſteth as a Mannor into Demeſnes and ſervices; a Rectory is divided into Glebe and Tithes; a houſe into ſoyle and ſtructure as hath appeared before. The Diviſion of *totum univerſale in ſuas ſpecies* is Logicall or Metaphyſicall: The Diviſion of *totum eſſentiale in ſuas partes eſſentiales* is Naturall; The Diviſion of *totum integrale in ſuas partes* is in manner Artificiall or Mechanicall; And this difference there is betweene *totum eſſentiale*, and *totum integrale, ut ſi una pars eſſentialis deſit, totum non poteſt dici mutilum ſed planè abolitum: Et ut priores duæ Diviſiones ſumuntur ex ſubſtantia*; *Ita hæc Diviſio totius integralis ſumitur ex quantitate*: And therefore *totum integrale* is twofold, the one I may call *totum integrale continuum*, and the other *totum integrale diſcretum*, even as quantity it ſelfe is divided. 3

Totum continuum eſt perfectè dictum, Quia ex partibus ſubſtantialibus & quantis per ſe unitis conſtat; eſtque vel homogeneum, vel heterogeneum; homogeneum eſt quod ex partibus idem nomen cum toto habentibus conſtat, as all parts of water are water, all parts of bone are bone, all parts of fleſh is fleſh,

1.R.3.fo. 3. every yeard of a peece of cloth is cloth.

Heterogeneum est quod constat ex partibus diversi nominis à toto, ut corpus humanum constans ex capite, thorace, corde, pedibus &c. & ex his partibus quædam sunt Principales, sine quibus totum non potest manere incolume, ita partes humani corporis constituuntur à
2.R.3.2.b. *medicis cerebrum, cor & epur: minùs Principales quæ abesse possunt sine totius interitu, ut manus, pes, &c.*

Totum discretum est totum imperfectè dictum, & constat ex aggregatione partium, vel substantialium, vel accidentaliũ, ex qua aggregatione non oritur totum per se unum, ut in substãtialibus, acervus lapidum, grex ovium, &c. And of these wee have some few examples in the Law, as the Cart and Oxen or Horses drawing the same, may all bee distrained, and the distresse not excessive, because they all make
8.H.4.16. but one totall: And so in a Deodand may all be
Brooke distr. forfeit, because they make but one totall, moving
55. to the death. So likewise a Corporation may be called *totum integrale discretum ob aggregatum, quod ex multis personis aggregatis constat.* 20.E.4.3.*Broo. distr.* 89.12.H.8.13.*b.*

Totum discretum accidentale, sive ex partibus accidentalibus constans, est quod impropriè & planè accidentaliter totum dicitur; & est cum 1, *causatum ex suis causis dividitur*; 2, *cum subjectum per sua accidentia*; 3. *cum accidens per sua subjecta*; 4, *cum accidens per sua accidentia dividitur.* And here I leave, for I shun to be over tedious or curious in these things, for that my indeavour is rather diligently to try the use, then curiously to enquire the Art.

Because wee have formerly both defined and divided

divided by the cauſes, it ſhall be neceſſary to ſay ſomething of them.

There be foure cauſes of every thing, the materiall, the formall, and the efficient, and fourthly, the finall cauſe, whereof two are eſſentiall as it were, and enter into the compoſition, as the materiall and formall, and the two other are the externall, the efficient, and the finall cauſe.

The materiall cauſe they have divided into three kinds, although improperly, yet for uſe ſufficiently, as *materia ex qua*, *materia in qua*, and *materia circa quam*. *Materialis cauſa.*

Materia ex qua may be thus defined, *materia eſt qua cum forma conſtituit rem*, & this regarded as well in things ſubſtantiall, as accidentall, and then hath it alſo two kinds, *materia permanens*, which remaineth in the thing conſtituted, as an houſe made of ſtones, timber, earth, &c. A garment made of cloth, wollen, linnen or ſilke; A Potters veſſell made of earth, all which as ſubſtances do remaine in the thing compoſed. 1

Or *materia tranſiens*, which is changed in the mixture or compoſition, as meale and water are the materiall cauſes of bread, but tranſient and changed in the compoſition. 2

In accidentall things ſuch as are moſt Titles or matters of the Law, there is the like compoſition of matter and forme, as by example hereafter in many particular things will bee made manifeſt, as in all your Inheritances or hereditaments, corporall compound.

And of this kinde of materiall cauſe, *Materia*

ex qua, there is another Diuiſion; for it is either *materia remota* or *propinqua*, remote, as a garment of wollen cloth hath woll to be the remote or mediate cauſe, and wollen cloth for the propinque and immediate cauſe.

Materia in qua, and *materia circa quam*, are cauſes improper and ſeene in accidentall things; as *materia in qua eſt ſubjectum*, and *materia circa quam eſt objectum*.

Formalis. Forme or the formall cauſe is ſaid to be *cauſa unde formatum pendet*, and is either ſubſtantiall, as the ſoule of man, whereby hee conſiſteth, is the forme of man, for as *Plato* ſaid *Anima cujuſque eſt quiſq;*, and this cauſe is thus deſcribed, *forma eſt qua dat eſſe rei*, and it is alſo *remota* or *propinqua*.

The accidentall forme in ſubſtances is the outer ſhape and figure of things, which for want of the true knowledge of the inward, wee be often compelled to uſe.

The accidentall forme in accidents is *Eſſentia*, as *forma Reip: eſt ordo & unio inter Magiſtratum & ſubditos certis legibus ſancita*, whereof reſult the ſundry kindes of Common Wealths.

There reſteth the conſideration of the efficient and finall cauſes.

Cauſa efficiens eſt, à qua primò incepit motus & operatio; of theſe efficient cauſes ſome doe precede the worke, and ſome doe effect the worke; Cauſes efficient which doe precede the worke. are impulſive cauſes; the firſt inſtigation which move the undertaking of the worke: So *Cicero pro Milone*, *Maxima illecebra peccandi impunitatis ſpes*,

ſpes; A great impulſive cauſe of offence is the hope to eſcape unpuniſhed.

So *Saluſt* maketh the immoderate deſire of rule and vaine glory to be oftentimes the impulſive cauſe of warre, *libidinem dominandi cauſam belli habent, & maximam gloriam in maximo imperio ponunt*. Theſe be internall impulſive cauſes; there are alſo externall; ſo liberality and beneficence is a great externall impulſive cauſe of benevolence; *Qui liberalitate utuntur benevolentiam ſibi conciliant*: So truth ſpeaking is ſometimes an impulſive cauſe of hatred, flattery of friends, *veritas odium parit, obſequium amicos*. *Cic. lib. 2. de Finibus.*

Cauſes that effect the worke, are thoſe that are active to perfore the worke; Thoſe that are agents in the worke are, 1, the neceſſary or ſole cauſe, 2, the ſufficient cauſe, which alſo may be ſole, but not of neceſſity required; 3, the coadjuvant cauſe, and fourthly, the inſtrumentall cauſe.

Neceſſaria cauſa ea vocatur à qua ita procedit effectus, ut non poſsit poſita cauſa non procedere effectus, nec ab alia cauſa talis effectus poſsit provenire. 1

So God was the efficient cauſe, and ſole cauſe in creating of the world; And ſo the Sunne is the ſole efficient neceſſary cauſe of the day by his light in our Hemiſpher effecting the ſame.

The efficient cauſe which is called the ſufficient is that cauſe which is able alone to produce the work; but it is not the ſole and onely cauſe to produce that effect, for that that effect may as well be produced by another cauſe as ſufficient as the for- 2

former. As fire is the cause of heat, and sufficient alone to produce heat; and yet heat doth not alwayes proceed from the fire, but from the Sun, from exercise, and sundry other meanes, so that fire is not necessary and alone required to bring forth heat.

Coadjuvant causes are those that worke to the producing of the effect, but together with some other cause, which is more principall in the operation; So in the obtaining of a victorie by battell, the Generall is not the sole cause, but there doe concurre the Captaines, Centurions, Souldiers, and such like; as *Cicero* in his Oration *pro Marcello, in societatem victoriæ cum Cæsare venisse Duces, Centuriones, Milites.* So *Afranius* the Poet speaketh of Wisedome, *usus me genuit, Mater peperit Memoria.*

The instrumentall causes are the instruments used in the worke, *Instrumentales causæ* (saith one) *sunt organa per quæ est efficax causa Principalis,* as Bookes are the instrumentall causes of learning *& militum instrumenta sunt arma,* to which may be adjoyned that cause which they call *causa sine qua non,* as *Medium in visione.*

Causes that follow the worke, are called Conservant causes, *Polibius* yeeldeth this example, *Duæ sunt quibus omnis Respublica servatur, in hostes fortitudo & domi concordia.* So in another example, *Seneca, Melius beneficijs Imperium custoditur quam armis.*

And of all these efficient causes as touching the manner of the working, some are causes mediate, or

or removed, and ſome are immediate and propinque.

This may ſuffice briefly for the knowledge of the nature of the efficient cauſe, if we adde a word of the accidentall cauſe, namely, an accident that happeneth not intended, but caſually intervenient, and yeeldeth furtherance to the effect: *Sic piſcatio fuit cauſa fortuita, & per accidens, piſcatoribus Mileſiis, aurei tripodis inveniendi.* And ſo *Cicero lib. 3. de natura Deorum: Phædro Iaſoni profuit hoſtis, qui gladio quo cum petere volebat, vomicam ejus apperuit, quam Medici ſanare non poterant.* And ſo wee ſee that in the Law a caſuall chance is the cauſe of the death of man, although perpetrated by the act of another. *Cic. l. 3. de natura Deorum.*

There followeth the laſt and finall cauſe, and it is that cauſe *Cujus gratia efficiens agit*, and it is the fruition of the work, and therefore *finis eſt ipſe uſus rei*, and oftentimes differeth not from the effect it ſelfe, *re vera, ſed ratione finis. Finis*, ſaith *Ariſtotle, eſt primus in intentione, & ultimus in executione*: The firſt thing intended, and the laſt thing effected. *Finalis.*

The power of the end or finall cauſe is twofold, it is firſt impulſive to the worke; ſecondly, directive to the meanes, and therefore it is often called *Cauſa cauſarum.*

In reſpect of his impulſive power it may be one *re* with the efficient, impulſive, inward cauſe, and it is the ſame which directeth the meanes, and giveth name to the action, as *Bracton* ſpeaketh; *Intentio tua, & affectio tua nomen imponit operi tuo.* And

 againe,

againe, *Tolle voluntatem, & omnis actus erit indifferens.* And therefore in as much as the finall cause directeth the meanes, *Non faciamus malum, ut inde eveniat bonum.*

Cicero most excellently, *lib. 2. de natura Deorum*, expresseth notably the finall causes of all things: *Omnia aliorum sunt causa generata, ut fruges atque fructus quos terra gignit, animantium causa; animantes autem hominum, ut Equus vehendi causa, Bos arandi, venandi & custodiendi Canis, ipse autem Homo ortus est ad mundum contemplandum & imitandum.* And againe the same Author; *Homines hominum causa generati, ut ipsi inter se alij alijs prodesse possint.* 1. Offic. Likewise the same Author doth excellently expresse the end of government: *Moderatori Reip. beata Civium vita proposita est, ut ea nimirum opibus firma, copijs locuples, gloria ampla, virtute honesta sit.* Of one and the selfe same thing there may be many finall causes, *Unde quidam sunt Principales & ultimi, & alij intermedij, qui quodam modo ad ultimum conducunt.*

Thus much may suffice in the consideration of the causes, and of these things that have beene affirmed, The Student may be instructed sufficiently to undergoe the first Logicall Exercise, which is *Tractatio simplicis Thematis*, an exercise of wonderfull use in the true obtaining of the knowledge of matter for *Argument* in every Case, and upon every sudden occasion, and wherein those things which we have spoken of the causes may be abundantly exemplified.

the Law, and is able to furnish him with copy

There

There resteth then nothing but to shew the manner how it may be performed, and to set forth some examples in the Law of the same: But before I depart from this discourse of the causes, for the better explanation of that which hath been said touching the same, we will adde some examples and instances drawne out of the Volumes of the Lawes, and out of the Arguments of Cases debated, that thereby our Student may the better understand the use thereof.

Therefore first of all touching that materiall cause, *Ex qua res constituitur*, wee may observe in the Law, That in things corporall compound this kinde of matter resulteth to be one with the integrall parts; as the matter whereof an house is composed are these materialls of Stone, Timber, Earth, Lime, and such like, whereof it is framed, and which are the integrall parts of this whole. 1

So a Mannor which is *Quiddam totum compositum corporale*, consisteth of Demesnes and Services; and the Demesnes doe containe, land, meadowe, pasture, wood, &c. and the services doe import not onely the rent payable, but the corporall service and attendancy of the Tenants thereof. *A Mannor.*

So a Monastery, site, house, and also the lands & possessions belonging thereunto, is included in the generall name Monastery, because those import the matter *ex qua consistit*. *Monastery.* 38.E.3.21.a *Com.* 168.b.

So the matter of a Parke is land inclosed, and the Deere; for the Deere are held as parcell of the Parke. 5.E.4.28.a *Ardun.* 10.H.7.6.a. 10 H.7.30.a

Of corporall things the matter is alſo corporall and viſible, and are ſubject to manuall tradition and delivery; as the matter of a Rent is a ſumme of money, or other corporall thing payable, reſerved or granted, as Rent-Corne, and ſuch like.

Rent.

Tithes. The matter of Tithes are things annually produced by way of increaſe.

Herriot. The matter of an Herriot or Mortuary is the beſt beaſt of the owner.

Corporation. The matter of a Corporation conſiſteth in the bodies naturall of the perſon or perſons of which it is combined; who although they be framed into a politike conſideration of perdurance and ſucceſſion, yet is there in that conſideration a reſpect alſo had of the body naturall.

Vide 21. E. 4 56. a 63. a. 68. a.

Of things incorporeall conſidered by the Law, the matter or materiall cauſe is that which is put into the definition *loco generis*, in lieu of the generall: for true it is that *Genus in definitione vel deſcriptione ſupplet vicem materiæ, differentia vero formæ.*

Fee. So we may ſay that the materiall of a Fee Simple, and alſo of an Eſtate Taile, is an inheritance, becauſe inheritance is the *genus* in the definition or deſcription of both of them.

Homage. The matter of Homage is a corporall ſervice.

Warranty. The matter of Warranty is a Covenant reall, whereby the party which made it ſtandeth bound to defend the thing warranted by him, or to yeeld in value.

The Law. The matter of the Law of England generally taken,

taken, *ex qua conſtituitur*, is the law of Nature, the law of God, the generall Cuſtomes of the Realm, Maximes drawne out of the Law of Nature, as the Principles of Reaſon, primarily or ſecondarily deduced, Conſtitutions and Acts of Parliament. *Materia circa quam*, on which it worketh, are *lites & contentiones*, caſes of debate daily comming into queſtion touching perſons, poſſeſſions, and injuries done by word or act.

In a contract of Sale, the materiall cauſes are the things ſold, and the price agreed upon; the forme is the manner of the contract, abſolute or conditionall, perpetuall or temporary; the efficient cauſes, the parties contracting, the buyer and the ſeller; the end or finall cauſe is to tranſferre property from the one to the other, to ſupply each others indigence: the matter *ex qua*, is either permament or tranſient, as hath beene ſaid: The conſideration whereof yeeldeth in the Law this fruitfull diſtinction: For if a man take wrongfully the materiall which was mine, and is permanent, not adding any other thing thereunto, than the forme onely by alteration thereof, ſuch thing ſo newly formed by an exterior forme, notwithſtanding ſtill remaineth mine, (as ſome have held opinion) and may be ſeiſed againe by me, and I may take it out of his poſſeſſion as mine owne: But they ſay, if he adde ſome other matter thereunto, as of another mans leather doth make ſhooes or boots, or of my cloth maketh garments, adding to the accompliſhment thereof of his owne, he hath thereby altered the property, ſo *Sale.*

that the first owner cannot seize the thing so composed, but is driven to his action to recover his remedy; howbeit by the judgement of the Court in a case of that nature depending, it hath beene determined that the first owner might seize the same, notwithstanding such addition. But if the thing be transitory in his nature by the change, as if one take my corne or meale, and maketh therof bread, I cannot in that case seize the bread, because as the Civill Law speaketh, *Hæc species facta ex materia aliena, in pristinam formam reduci non potest, ergo ei à quo est facta cedit.*

So some have said, that if a man take my barly, and make thereof malt, because it is changed into another nature the barly cannot be seised by me.

Regula. But the sure Rule is, That where the materiall wrongfully taken away could not at first before any alteration be seised, for that it could not bee distinguished from other things of that kinde, as corne, money, and such like; there those things cannot be seised by the former owner, because the property of those things cannot be distinguished. For if my money be wrongfully taken away, and he that taketh it doe make plate thereof, or doe convert my plate into money, I cannot seize the same, for that money is undistinguishable from other money of that coyne.

If a Butcher take wrongfully my Oxe, and doth kill it, and bring it into the Market to bee sold, I may not seize upon the flesh, for it cannot bee

12.*H.*8.9.*b.* 10.*a.* knowne from others of that kinde: But if it bee found hanging in the skin, where the marke may ap-

appeare, I may ſeize the ſame, although when it was taken from me it had life, and now is dead.

So if a man cut downe my Tree, and ſquare it into a beame of timber, I may ſeize the ſame, for he hath neither altered the nature thereof, nor added any thing but exterior forme thereunto. But if he lay the beame of timber into the building of a houſe, I may not ſeize the ſame, for being ſo ſet it is become parcell of the houſe, and ſo in ſuppoſition of Law after a ſort altered in his nature.

Againe, by conſideration of the nature of the matter or materiall cauſes of things, the law doth frame ſundry differences; as if I deliver unto one a piece of cloth of twenty yards together to keep, and reſtore it unto me when it ſhall be demanded, and the party will cut it into ſeverall yards and pieces of cloth, hee hath not altered the matter thereof, nor diminiſhed the quantity, and yet if he tender the ſame unto me I am not bound to accept thereof, but may recover my damages for that wrong ſo offered unto me; for although in matter and ſubſtance it be the ſame, yet it is altered in forme, and impaired in the uſe.

So if he take my piece of plate, and breake it into pieces, &c. 18.E.4.23. a.b.

Likewiſe the Statute made in the time of King *Edward* the firſt concerning Wrecks, hath ordained that if a Ship be wrecked, if any living thing therein eſcape alive, it ſhall not be adjudged; but that the Merchandize therein be viewed and preſerved for the owner, if he come to challenge the ſame *Wrecke.*

ſame within a yeare and a day. But what if in ſuch caſe the Merchandize be victuall, as freſh fiſh; or fruit, as Orenges and ſuch like, as will not laſt uncorrupt by the ſpace of a yeare, if the Sheriſe in ſuch caſe ſhould ſell thoſe goods within the year, and be ready to yeeld the money to the owner, hath he offended that law? Certainly no: for the conſideration of the nature and matter of thoſe things in ſuch caſe cauſeth the ſaid law to be interpreted contrary to the letter of the law: For the letter of the law commandeth a preſervation, and in this caſe the Sheriſe hath done contrary, for he hath ſold, and yet nevertheleſſe hath juſtly executed that law.

Pl.Com.465 466.a.

Thus you ſee that the conſideration of the matter or materiall cauſes whereof the things controverted doe conſiſt, hath great uſe in the deciſion of law.

Materia in qua is onely *ſubjectum accidentium*, and therefore conſiderable in accidents onely, which ſubſiſt in their proper ſubjects, as Knowledge in the Vnderſtanding; the Vertues morall in the Will of man; health, ſtrength, and agility in the Body: And as *Materia in qua* is ſaid to be *ſubjectum*, ſo is *Materia circa quam*, *objectum*, both which are ſomewhat improperly attributed to the materiall cauſe, and are both ſo evident as I paſſe them over.

Monaſtery. In conſideration of a Monaſtery, the matter *in qua*, or ſubject of that Title, is the perſons whereof that Corporation conſiſteth; as the Abbot and his Monkes, that is, his Covent; The Prior and

and his Cofreers; The matter *circa quam* is comprised in their possessions.

In an Arbitrement (of which I shall speake more hereafter) the matter *in qua* are the parties at strife, *circa quam* the thing whereof the controversie riseth, reall or personall: The materiall cause *ex qua* is most eminent, and most eminent to be found in things corporeall, having of themselves substance; and in things incorporate, that which is *loco generis in descriptione*, in both which as there is *genus propinquum*, and *genus remotum*, so is there *materia remota*, & *materia propinqua*. *Arbitrement.*

As a Fine whereby lands or hereditaments are conveyed, is said to bee a concord, for the entry thereof is, *Est concordia talis*; but this is *genus remotum*, or *materia remota*: for an Arbitrement is also a Concord, a Contract is a Concord: but to say it is a concord of Record, is to adde *genus propinquum*. And thus much touching the materiall cause. *Fine.*

As touching the formal cause, it is either as hath beene said, substantiall or accidentall: The formall substantiall cause in things of life, is that which is the fountaine of life and motion: In things which are without life, that are simple and uncompound, it limiteth their bounds, and is the cause of their being: In things that are compoũd it is the convenient knitting and union of the parts. The formall cause entreth the definition or description *loco differentiæ*, bringing and adding particularity unto the generall, untill it doth fulfill a perfect definition or description, and there- *The formall cause exemplified.*

fore as one saith well, *dicitur forma à formando: Differentia verò quia differre facit.* The forme is said to bee *Modus quidam materiæ, quo sibi contingat, ut hujus vel illius speciei capiat nomen:* And *forma dat esse rei,* and that *esse* is nothing else but *existentia formæ in materia, eaq; plus affert ad essentiam rei quàm materia, est enim ipsamet essentia aut certè præcipua pars essentiæ.*

Claime. In the Cõmentaries of Mr. *Plowden* in the Lord *Zouches* case, a claime is thus described; A Claime is a Challenge by a man made of the property or ownership of a thing which he hath not in possession, but is detained from him, where the *genus* is Challenge, but to expresse what manner of Challenge, there is added this difference, namely, of the property and ownership of a thing detained, which is *loco formæ*: So three of the causes are comprehended in that definition or description: The materiall cause *de qua, viz.* a Challenge, *circa quam,* of things detained: The formall cause the property or ownership, the efficient cause by a man wronged, onely there wanteth the finall cause which is twofold, 1, to manifest that property, 2, to reduce the same propertie backe againe to him for whom the claime is made.

Cond. of Oblig. In 2 *H.* 8. 17 *a. Dyer.* The Condition of an Obligation is thus described: The Condition of an Obligation is an assent of the obligee in defeasance of an obligation made for the advantage of the obligor, where the matter thereof is an assent, the forme a defeasance, the efficient cause the obligor and obligee, the finall cause the advantage of the Obligor.

A

A Contract is an agreement betweene parties concerning goods or lands for mony or other recompence, where the generall matter *ex qua* is the agreement, which is chiefly respected in contracts: the matter *circa quam*, concerning goods or lands: the forme or difference, for money or other recompence, for that maketh it a contract, for the want of recompence causeth it to bee but *nudum pactum, unde non oritur actio*. The causes efficient, the parties contracting. The finall cause *Bracton* doth notably expresse, *Inventa sunt hujusmodi stipulationes & obligationes ad hoc, ut unusquisq; habeat, & sibi acquirat quod suum interest.*

Contract. *Dr. Stu. c. 24. fo. 103. a.* *Com. Browning & Beston. 141. a.* *Com. 141.* *Bract. lib. 3. 8. 2. f. 100.*

In the Reports of my Lord *Dyer*, *16. El. 336. b. n. 34. a.* A Consideration is thus described: A Consideration is a cause or occasion meritorious requiring mutuall recompence in fact or in Law: where the matter is an occasion meritorious, the forme mutuall recompence, &c. not to trouble our selves over long in this kinde. *Consideration*

Secondly, in consideration of the formall cause there is to be observed, That when division or distribution is made *ex causis*, those divisions which doe proceed of the formall cause are most essentiall, whereof I shall shew some few instances or examples.

Commons being divided according to their materiall causes, are either Commons of pasture, Commons Estovers, Common of Turbary, &c. But being divided according to their formall causes; all Commons are either Appendant, Appurtenant, or in grosse. *Commons.*

Conditions. If you distribute Conditions according to their materiall causes, or things whereof they are, then we say they are conditions reall, which are annexed to the estates; There are also conditions personall, annexed to personall contracts, as to Obligations of all kinds, promises, covenants, and other contracts: But being divided according to their forme, There we may say, that all conditions are either possible or impossible: and impossible conditions are voyd in Law: All possible conditions are either lawfull or unlawfull; and unlawfull conditions doe make the contract also voyd, whereas impossible conditions are onely voyd themselves, but the contract standeth single: all lawfull conditions are either precedent or subsequent, and all those conditions which are annexed to estates, are either by way of encrease of estates, or by way of defeasance of estates.

Consider. All considerations are either executed with a recompence past, or else executory with a recompence after to bee made and performed; And this Division is *ex causa formali*.

In as much as the forme giveth the essence, it was said of *Vlpian* the *Romane Lawyer*, out of the rules of Logicke, That *mutata forma propè interimitur substantiarei*: For so in the former examples wee see, that if a man take my Barley and make Malt thereof, it cannot be seised by the former Owner; and yet neither matter, quantity nor outward forme is lost, but it is become a thing of another nature and vse, because the inward forme (to speake as Morall Philosophers) whereof dependeth the use, is changed; for Morall Philoso-

phy doth not ſo curiouſly obſerve the naturall cauſes as Naturall Philoſophy; but according as to the information of manners: So if a man of any peece of cloth which he had to keepe containing 20. yards in one whole peece, will cut the ſame into 20. ſeverall yards and peeces, The matter nor the quantity is not changed, and yet if hee will reſtore the ſame peeces, it is no lawfull reſtitution, neither am I bound to receive it.

If a man poſſeſſed of 20. packes of Wool, by his laſt will and Teſtament deviſe and bequeath all the ſaid Wooll unto *I. Stile*, and after the Teſtator cõverteth the ſame wooll into cloth and dieth poſſeſſed of the ſame cloth. *I: Stile* the Deviſee of the Wooll ſhall not have by Law the cloth made of that Woll, for that the forme of the Wooll is changed, notwithſtanding the matter doth remaine, and it is turned to a thing of another nature; and the making of the ſaid Wooll into cloth by the Teſtator himſelfe is a countermand of the ſaid laſt will and Teſtament. So it is alſo of things incident, as if the principall thing whereunto another thing is incident, appendant or belonging, be changed in nature, the incident is loſt and altered: As if a man have a dwelling houſe whereunto there is a Common of Eſtovers belonging (which is wood for firing to be burnt in that houſe) if this houſe by caſualty of fire or tempeſt be burned or blowne downe, or taken downe, and a new be built in another place neere, or in another forme, the Common of Eſtovers is loſt, and not to be uſed in this new houſe,

for this is not the former houſe, but another houſe unto which the ſaid Eſtovers cannot belong; but if the ſaid firſt houſe were not wholly pulled downe but repaired, or if another new houſe be built upon the ſame foundation, and in the ſame forme with the former; The Common of Eſtovers remaineth with the new houſe, for that in judgement of Law is the ſame houſe: and ſuch building being upon the former foundation is but a reparation.

But here a difference is to be obſerved, that if the thing incident doe not belong to the principal thing, as it is in nature a ſpeciall thing, but in the generall; then although the ſaid principall thing be altered in *ſpecie*, the generall remaining, the thing incident ſhall remaine to ſuch generall: As if a man have a water-corn-mill, unto the wch hee hath a Mill-leat or water-courſe belonging comming thorough the land of another man unto the ſaid Mill. Now if hee change the nature of the ſaid Corne-mill, unto a fulling-mill, or *è converſo*, wherein both forme and finall cauſe, namely the uſe is altered; it hath beene much diſputed in our time, whether the ſaid water-courſe did lawfully belong unto the ſaid fulling-mill, as it did when it was a Corne-mill? for the owner of the land where thorough the ſaid ſtreame did runne, had diverted the ſaid water-courſe, pretending that he might lawfully do the ſame, for that the owner of the Mill had changed the nature of the Mill; and the preſcription to have the ſayd water-courſe is thereby altered: But it was adjudged

judged that the ſaid water-courſe did ſtill belong and remaine, and ſo ought unto the fulling-mill, as it had formerly done unto the Corne-mill, for that it did not belong unto the Corne-mill, as ſpecially unto a Corne-mill, but it did belong unto it generally as unto a mill going or driven with water, and not otherwiſe.

And thus much may ſuffice for the conſideration of the formall cauſe, as it is the eſſentiall and ſubſtantiall cauſe.

The Law alſo conſidereth accidentall formes, for the Law preſcribeth a forme in all abjurations; ſo likewiſe the Law preſcribeth a forme how homage ſhall bee made by the Tenant unto the Lord: And ſo likewiſe of Fealty, both which *Littleton* doth expreſſe: The Law preſcribeth the forme how Battaile in a writ of right, and in an Appeale ſhall be waged and performed: So likewiſe the Eccleſiaſticall Lawes preſcribe formes of Conſecrations of Churches, Chappells, &c. of Parſons, Orders, Inſtitutions, Inductions, and ſuch like.

All Lawes doe retaine ſome formalities which may not be altered, as in the Common Lawes of this Realme, we have our formes of Writs, Pleadings, Entries of judgements, and ſundry other formes and ceremonies ordayned, which without great and urgent cauſes cannot be altered.

Theſe outward formes are nothing elſe, as one deſcribeth, then *modi quidam rebus agendis præſcripti*, or as another deſcribeth, *Ordinata ſeries rem ad ſubſtantiam deducentes*: And concerning theſe out-

outward formes and ſolemnities, theſe rules are obſerved and preſcribed; 1, *forma præfinita omiſſio reddit actum invallidum : Procurator, Cod: de Procuratore. Le: diligenter in Princip: ff. de mandatis.* And againe, *Qui formam prætermittit jam aliud facere videtur :* And thus much concerning the formall cauſe.

The efficient cauſe exemplified. As touching the efficient cauſe; the impulſive inward cauſes of all crimes are commonly theſe, *ſpes lucri, impunitatis, vindictæ, malitiæ, odij, &c.* The outward, the acceſſary before the fact, which is the abettor and inſtigator thereunto.

Contract. The ſufficient and neceſſary cauſe of a Contract is conſent of parties, for in Contracts the conſent is chiefly to bee regarded, as hath beene ſaid.

Mariage. And in Mariage *Conſenſus, & non Concubitus matrimonium facit: C: Nuptiæ, de Regulis Iuris.* And as *Bracton, lib. 1. ca. 5. ff. 7.* alleageth, *fit per mutuam utriuſq; voluntatem.*

Appropriatio. In the worke there are both principall and coadjuvant cauſes: In an Appropriation of a Church the efficient cauſes are, The Ordinary, the Patron, and the King, and they ought to agree in the act, *& ſunt Actores hujus fabulæ :* The Ordinary, inferiour or ſupreme, for hee is the principall Agent therein, becauſe he hath the ſpirituall juriſdiction; And the Act of the Appropriation is a thing ſpirituall: And the Ordinary ſaith, *appropriamus, conſolidamus, & unimus*, as the principall Actor in the cauſe: The Ordinary may bee termed therefore the principall efficient cauſe, and the other

Com. 498.

the

the coadjuvant cauſe. Theſe the Pope in ancient times as ſupreme *Ordinary* then permitted, uſed to doe; and theſe as ſupreme *Ordinary* may the King doe, but alwayes with the conſent of the Patrone, who is a coadjuvant efficient cauſe: the formall cauſe is the conſolidation of the *Incumbency* and *Patronage* into one *perſon* capable of ſpirituall charge: and the finall cauſe to make a perpetuall Incumbency.

The efficient cauſes of an Act of Parliament, are the aſſent of the three Eſtates; namely, firſt of the *King*; ſecondly, of the *Lords Spirituall and Temporall*; and thirdly, of the *Commons*; and each without the other cannot perfit this worke; and yet untill the Royall aſſent it is but as an *Embrio in ventre matris*, 4.*H*.7.9.*b*. *Com*. 79.*a*. and by the Royall Aſſent comming laſt, it taketh life and vigour. *Act of Parliament.*

Writing, ſealing, and delivery, are the efficient cauſes of a Deed, all muſt concurre, and each without other is fruitleſſe; but the complemental act which commeth laſt of all is the delivery, and thereby the Deed receiveth his perfection. *Deed.* *Com*. 108.*b*. 22.*H*.6.45.*b* 1.*H*.6.4.*b*. 2.*E*.4.3.*b*.

If divers come together to doe a murther, although one alone doe give the wound whereby death enſueth, yet are they all which are preſent and conſenting to the act, Principals and efficient cauſes of this murther; he that ſtriketh is the principall agent, and the reſt coadjuvant: and yet although one gave the ſtroke, yet ſhall it be adjudged in law the ſtroke of every of them, given by him whichgave it, as for himſelfe, and given of the *Murther.*

others by him as their minister and instrument, and yet all equall in degree as principals, and not
Com. 98. a. accessaries: and yet as you see not equall in degree as efficient causes.

Raviſhment. If a man and a woman be present, with purpose that the man shall by violence carnally know the body of another woman there also present, against her will, and the man doth the fact in the presence of the other woman, she that was so present, as well as the man, shall be a Principall Ravisher; the one, *viz.* the man, the cause agent, and the other coadjuvant: and so one woman may be a principall to the raviſhment of another.

Livery. Livery and seisin is the instrumentall efficient cause of the conveyance of a Freehold estate in land, and sufficient alone to performe the same, and yet is it not the sole cause, for it may be conveyed by other meanes, as by fine, bargaine and sale, by devise, and otherwise.

Casuall. There is also an efficient cause casuall: As if a man intend to doe an unlawfull act, and in doing thereof another hurt ensueth, not intended, but by chance, cleane beyond all expectation or desire, yet shall he be said the author of that act not intended, so happening by chance, that did the first act.

The finall cause exemplified. This may suffice to exemplifie the cause efficient: There resteth the finall cause, of the which I will shew some examples, as I have done in the rest. Many arguments are drawne from the finall cause, and of much use in the law.

The end and finall cause of the law generally taken,

taken, as *Bracton* well affirmeth, is this, *Finis legis eſt ut ſopiantur jurgia, & vitia propulſentur, & ut in regno conſervetur pax & juſtitia. Bracton li. 2. cap. 2.*

The finall cauſe of an action is, as likewiſe the ſame *Bracton* affirmeth, *Vt non liceat unicuique ſe ſine Iudicio vindicare, & quod ſibi ablatum eſt per Iudicem repoſcat.*

The finall cauſe why alſo the ſame ought to be by writ, is, *Quòd ſine brevi non debet quis experire in Iudicio, nec mutari poteſt petentis intentio vel modus petendi.* *Brac. 102. a.*

The end why Attorneyes are permitted in Court, or a man to anſwer by Baily in an Aſſize, or to purſue or defend by Guardian, is, *Vt qui rebus ſuis ſupereſſe vel nolunt vel non poſſunt, per alios poſſint vel agere vel convenire.* *Le. de Procura. Attorney.*

The finall cauſe why an Attorney is required to a Grant, is that the Tenant may know to whom he ought to be attendant to pay his rent, or to do his ſervice, ſo that where there is no attendancy required, there needeth no attornement. *31. H. 8. b Attornem. 60 2. E. 6. d. Att. 45.*

The finall ſcope and end of the Averment of a Pleading, is to reduce matter traverſable to a cleere and certain iſſue: and therefore if the matter pleadable be not anſwerable or iſſuable, there needeth no Averment. *36. H. 6. 17. b.* *Averment.*

The finall cauſe why Wardſhip was ordained, is, *Vt qui per ætatem ſe ipſos defendere nequeant, ab aliis defendantur. Q. Eſt autem. Inſtitu. de tutela.* Agreeably ſaith *Bracton*, *Quoſdam oportet eſſe ſub tutela & cura aliorum, eò quòd ſe ipſos regere non norunt.* *Wardſhip.*

Bract. lib. 2. cap. 16. b. Le. 4. ff. de pignoribus.

The end why writings were made betweene men in their contracts, was as the ſame *Bracton* alledgeth, *Fiunt aliquando donationes in ſcriptis, ſicut in chartis ob perpetuam memoriam, propter brevem hominum vitam, & ut facilius probari poſſit donatio.*

Livery.

So the cauſe why Livery and Seiſin was ordained in the Law, and firſt invented, was becauſe it is a thing notorious, that the people might take knowledge of the paſſing of eſtate of moſt accompt, and be the more able to try the ſame when they ſhould happen to be impanneled on a Iury for that purpoſe.

It would be over tedious to heape up more examples, which almoſt are evident in every Title concerning this matter.

As we doe conſider the end of things at the Common Law, ſo alſo in Statute Lawes the end and ſcope that the makers of ſuch Lawes aymed at, is of ſpeciall regard in the interpretation of thoſe Lawes, and often conſidered by the Iudges, unto whom power of interpretation and expoſition of thoſe Lawes is given; as upon peruſall of ſundry caſes grounded upon Statute learning will moſt evidently appeare.

It often happeneth that the finall cauſes of things are more than one, and ſometimes many, and ſome of them ſubalterne each to other, and ſometimes diſtinct, whereof enſueth this exception to the generall rule, *Sublata cauſa tollitur effectus:* For if there be divers finall cauſes, although the one be taken away, yet the effect remaineth,

maineth, if one of the cauſes doe remaine: As for example, The finall cauſes of mariage are three, *Generatio Prolis, Conſervatio Domus, Solatio Vitæ*: and although hope of iſſue be taken away, yet the mariage ſubſiſteth firme. *Mariage.*

The finall cauſes of Arbitriments and Awards are alledged principally to bee two; firſt, every Arbitriment is ordained to make a finall determination, and to appeaſe the variances, ſtrifes, and debates betweene the parties referred unto them. *Arbitriment* 19.H.6.37.b *Nedham.* 8.E.4.10.a. *Laken.* 8.E.4. 12.a. *Yelverton.* 2

Secondly, every Arbitriment is ordained to reduce that which was uncertaine, by the divers allegations of the parties, to certainty: and every of theſe ought to concur in every good award. 6.H.4.6.a. *Hanford.* 4.H.9.17.b. *Weſton.*

So likewiſe our Bookes doe generally affirme, That in Actions where Ayde is grantable to the Tenant or Defendant, that the ſame is done for two cauſes; the one for feebleneſſe of eſtate of him that prayeth Ayde; ſecondly, for the loſſe or detriment that may come to him of whom the Ayd is prayed. 10.H.7.4.a. *Ayde.* 17.E.3.47.a 21.H.6.37.b

So the finall cauſes why ayd is granted of the King upon prayer thereof, are theſe, *Quiſque auxilium petit à Rege, oportet quod ſit per cartam Regis, de dono aut conceſſione rei petitæ, juxta effectum Statuti de Bigamis. Secundò, Vel aliter propter ſalvationem reverſionis Regis, vel alicujus tituli ſui. Tertiò, Vel aliter propter debilitatem ſtatus ſui. Quartò, Vel ubi Rex habere poſſit detrimentum*: And any of theſe ſuffice to grant the Ayd. 2.H.7.8.a. 4.H.6.18.b. 9.H.6.2.a.3. 22.E.4.21.a

The finall cauſes wherefore a confirmation is *Confirmation*

behoovfull, are set out by *Bracton* to bee these:

Bract. l. 2. fol. 58. *Quando donatio sit tantum bona pro tempore, & potest confirmari ab haeredibus, vel alijs qui jus postea habent. Secundo, Vel quando nunquam absolutè fuit status bonus, sed talis qui potuit evacuari. Tertiò, Vel cum quis rem alienam dederit, confirmatio requirenda fuit veri Possessoris seu Domini.*

Warranty. There are three finall causes of a Warranty of lands, &c. First, *Voucher* to recover in value, when the Tenant of the Land is impleaded by a stranger: secondly, *Rebutter*, to represse the party and his heyres that made the Warranty, if they should chance to sue: and the third, *Warrantia Chartæ*, by the Iudgement; in which Writ the lands shall be bound to a Recovery in value, *pro loco & tempore.*

As it was said at the beginning, that the end is alwayes the first thing in intention, and the last in execution, so are there things destinated to their end, and once being applyed thereunto doe alter their nature and become of another consideration: As in a former proposed example; If a man cut downe my Timber Tree, and square it of purpose to make a beame for a house, I that am the true owner may seize the same, notwithstanding it be framed for the building. But if it bee laid in the building, it may not bee seized by the owner, although the building be not perfected: for now it becommeth parcell of the house or building, as hath appeared in the former example. But if a man prepare all materialls for building upon his land, and is ready to build therewith, but dyeth before

before it be erected, those materialls shall goe unto the Executor or Administrator, and not unto the Heyre, who should have had them had they beene laid in the building, because they were *destinata tantum, quæ pro factis non habentur.*

The finall cause in all humane actions is of singular regard, for that all things attempted by men have their end; and the utility of the thing is measured by the end thereof; wherefore it is said well by one, *Vtile ex fine colligimus; quicquid enim utile est, id alicujus rei consequendæ causa utile oportet esse. In laude etiam & vituperatione finem respicimus, cum multis in rebus non tam referat quid facias, quam ob causam facias, ita ut factum ex fine laudetur vel vituperetur, & homo rectè dicitur potissimam causarum omnium esse finem:* And whereof we say vulgarly,

Exitus acta probat, finis non pugna coronat.

And many times the name and denomination of a thing is drawne from the finall cause; as a *Fine* used for the assurance of land, *dicitur finis, quia finem litibus imponit.* *Fine.*

Sometimes the Lawes regard the beginning of an act, *Origo rerum attendenda est*; sometimes the *media* or meanes to attaining it; and sometimes the end for which it is atchieved: To enter into discourse whereof in this place would be impertinent: and therefore by way of Law-examples thus much to have said of the causes shall suffice.

And thus much touching the reasons drawne from sundry parts of the Art of Logicke, proving the

the neceſſity, or at leaſt the utility thereof in the ſtudies of the Lawes of this Realme. Now reſteth that we propound ſome places out of the bookes of our Reports of our Common Law deciſions and determinations of Caſes, where the uſe of Logicke hath either beene required or admitted and practiſed. And although this bee evident in the moſt notable arguments at large in the books of the Law, where ſundry reaſons drawne from Logicall invention and Topicke places doe abundantly appeare to every one which will or can obſerve the ſame; yet in this place I will produce thoſe inſtances wherein the ſame are either named and expreſſed, or admitted and apparantly practiſed.

Where it is diſcourſed in the Reports of Sir *Edward Coke*, which Acts of Parliament are generall, which are ſpeciall; I finde obſerved theſe words, *Statuta generalia, & generale dicitur à genere, ſpeciale dicitur à ſpecie*; And which are *genus*, *ſpecies*, and *individuum*; know ye that *Spiritualty* is *genus*, a Biſhopricke or Deanary, &c. are *ſpecies*, and the Biſhopricke of *Norwich*, the Deanary of *Norwich*, &c. are *individua*; *ſic dicta, quia in partes dividi nequeant*: And out of that deduceth hee to your underſtanding what Acts of Parliament are generall, and which are ſpeciall. So there you ſee two of the moſt eminent Predicables remembred, *Genus & Species*, and unto them annexed the *Individuum*, whereof the *Species* is affirmed.

Debt per Obligat. In 11.*H*.7.23.*a*. An Action of debt was brought upon an obligation, where the obligation was endorſed,

dorſed, upon this condition, that if the defendant did make ſuch eſtate to the plaintiffe of certaine lands before ſuch a Feaſt, as the counſell of the plaintife ſhould adviſe, then the Obligation ſhould be voyd, the defendant pleaded, *quod conſilium querentis, non dedit ei adviſamentum*, before the ſaid Feaſt; now whether this plea is ſufficient or no, or whether he ſhould ſay, *nullum conſilium dedit adviſamentum*, or that *conſilium nullum dedit adviſamentum*; for it ſeemed that thoſe words *conſilium non dedit adviſamentum*, were not generall enough, of which opinion there was *Bryan*; ſo that admit that the plaintife had foure men of his counſell, and two of them gave counſell, and two of them not; here *conſilium non dedit adviſamentum* is true, *eò quod duo non dederunt*, but that *nullum conſilium dedit adviſamentum*, is falſe apparantly, In that caſe when two of them had given their adviſe; where hee ſheweth that *univerſalis negativa*, and *particularis negativa* may ſtand together, for proofe whereof he citeth the Sophiſters verſe,

Præ contradic, præ contrar, præ poſtq, ſubalter:

Accidents may bee conſidered *in abſtracto*, as they are without ſubject, and in their owne nature of themſelves; And alſo they may bee conſidered *in concreto*, as they reſide and ſubſiſt in their proper ſubject, and theſe are Logicall tearmes, and yet uſed in the Law. *Coke lib. 10. fo. 31.*

Although the Common Lawyers of this Realm uſing a continued ſpeech, *& non conciſis argumen-*

tis, yet doe they obſerve very oft the formes of Arguments uſed in the Schooles, as Sillogiſmes, Enthimemes, Inductions, Examples, Sorites, Dilemata, &c. as may be proved by ſundry inſtances: And firſt of Sillogiſmes.

In *Shellies* caſe the third point or queſtion of the caſe on the part of the plaintife, was reduced by them that argued of that ſide into a Sillogiſme thus;

That which originally veſted in the heyre and was not in the Anceſtor veſted in the heire by purchaſe,

But the uſe (ſpoken of in that caſe) veſted in *Richard Shelly* (who was brother and heire and was never veſted in *Edward Shelly* the Anceſtor,

Ergo,

The uſe veſted in *Richard Shelly* by purchaſe.

20. H. 7. b. A man brought an action of treſpaſſe againſt the Executors of his Anceſtors, for taking up and carying away of a Fornace which was fixed and annexed to the Freehold with morter, and it was held by three of the Iudges, *Read*, *Fiſher*, and *Kingſmill*, that the Action would lye, and that the taking away thereof was wrongfull, and their reaſon is there by the Reporter reduced to a Sillogiſme, in this manner:

Thoſe

Those things which cannot bee forfeited by Outlawry in a personall Action, nor bee attached in an Assise, nor distreyned for rent, those things the Executor cannot have, *Major.*

But a Fornace fixed, a table fixed in the ground with poasts, or a pale set in the ground, or bedsted of timber fixed to the ground, doores or windowes, or such like fixed to the ground or freehold, cannot be forfeited, nor attached, nor distreyned; *Minor.*

Ergo,

The Executors shall not have such things. *Con:*

Many reasons are proposed in the case of the *Postnati*, and Arguments framed and composed Sillogistically in *Calvins* case, as thus;

Every one that is an Alien by birth, may be or might have been an enemy by accident, but *Calvin* could never have beene at any time an enemy by any accident, *ergo*, he cannot be an Alien by birth. 1

Whosoever are borne under one naturall legiance, due by the law of nature to one Soveraigne, are naturall borne subjects, but *Calvin* was borne under one naturall legiance, and obedience due by the law of Nature to one Soveraigne, *Ergo*, He is a naturall borne subject. 2

Whosoever is borne under the Kings power and protection is no Alien; but *Calvin* was borne under the Kings power and protection, *Ergo*; 3

4 Every ſtranger borne muſt at the time of his birth be *amicus*, or *inimicus*, but *Calvin* at his birth could not be *inimicus*, becauſe he was *ſubditus* (and *amicus* properly he cannot bee called, for that is proper to an Alien freind that is in league; So *Scotia* where hee was borne cannot properly bee called *ſolum amici*, *Ergo*,

5 *Calvin* is no Stranger borne.

Whatſoever is due by the law of Nature cannot be altered; but legiance and obedience of the ſubject to the Soveraigne is due by the law of nature, *ergo*, it cannot be altered.

6 Whoſoever at his birth cannot be an Alien to the King of *England* cannot be an Alien to any of his Subjects of *England*: But *Calvin* at his birth could not bee an Alien to the King of *England*, *Ergo*, He could bee no Alien to any of the ſubjects of *England*. *Coke li.7. 24.b. 25.a.*

And thus much may ſuffice for example onely to point out the continuall and frequent uſe of Sillogiſticall diſpute in our pleadings and Law-Arguments.

I will next proceed to treat of the choice and election of Propoſitions and Principles; and likewiſe to exemplifie the ſame by ſundry examples out of the bookes of the Common Law, whereby our Student may be the better furniſhed and adapted with matter fit for Argumentation.

Methodus ſtudendi.

Ariſtotle in the firſt booke of his Topickes, expreſſing the meanes whereby in every faculty or ſcience intellectuall reſting upon diſcourſe of reaſon, men might abound in matter apt for argumentation, and might be furniſhed with copie of reaſon fit for the proofe or diſproofe of things called into debate, in ſuch the ſciences by them profeſſed, expreſſeth a foureſold obſervation.

1. *Quarum una* (as he ſaith) *eſt in propoſitionibus eligendis.* *Ariſt. Top. li. 1. cap 12, 13, 14.*

2 *Altera, in diſtinguendo quot modis quicquid dicatur.*

3 *Tertia, in differentijs inveniendis.*

4 *Quarta, in ſimilitudinis cognitione & ſcientia.*

All which are notable inſtruments of knowledge, greatly profitable, yea neceſſary for the obtaining of all ſuch ſciences as doe depend upon reaſon: and ſo conſequently much availeable to

to be obſerved in the ſtudy of the Lawes of this Land, which are grounded upon the depth of reaſon, and inveſted oftentimes by the name of reaſon in our Reported Caſes, and ruled Authorities of the ſame. 11.*H.*7.24.*b.* 13.*H.*7.23.*b. Com. Colib.* 270.*b. Com. Brown.* 140.*b.* 27.*H.*8.10.*a. Montague.*

Of which foure principles purpoſing (for direction of ſtudy) to ſay ſomewhat in order as they are afore propoſed, it is to be conſidered, that the firſt of them being *propoſitionum electio*, containeth the election, choice, obſervation, and collection of all received principles, propoſitions, ſentences, aſſertions, axiomes, and reaſons, importing either certainty of truth, or likelihood of probabilitie. Wherein firſt *Ariſtotle* giveth precepts to collect them, & then after giveth counſel ſo to digeſt them, as that they may at all times bee ready for our uſe: Wherefore hereof intending an ample diſcourſe, it ſhall be requiſite to follow the ordinary and beſt method by definition, diviſion, and the due ſpeculation of their cauſes, whereby may be manifeſted what they are, of how many kinds they are, the divers manner of collection of them; and laſtly, the end, ſcope, and uſe whereunto they tend, & the profit enſuing by obſervation of the.

That firſt therefore the names by which in our Law they have uſually beene called might bee made manifeſt before their nature be diſcovered; (*primò enim de nomine conveniat*) it may with little labour eaſily appeare, that ſundry are the titles or names given in the Volumes of Reports, and other Writings of the Law unto ſuch propoſitions

ons, as doe remaine as reasons of resolved cases.

Sometimes they have beene called grounds; So in the 30. *H.* 8. 44. *Dyer* n. 30. it is said, *est une auter grounde in tenure in Chief. s. Il doet este immediate del Roy; et il convient commencer, et prend son original creation per le Roy mesme, et per nul de ses subjects.* So likewise speakes *Rede.* 5. *Hen.* 7. 23. *b. Est bone Ground in Tresspas, discontinuance vers un est discontinuance vers touts*, with infinite such other. Grounds. *Vide* 12. *H.* 7. 13 *a. Davirs. Com.* 121. *b. Stamford.*

Sometimes they have beene called *Maximes*, for so saith *Fortescue* in the 34. *Hen.* 6. 33 *a. Est un Maxime en nostre Ley, Que in chescun action personal, le Nonsute del un sera le Nonsute de ambideux, forc prise in tiels cases que sont except per statute.* Maximes.

Likewise saith *Knightley*, 29. *Hen.* 8. 38. *a. Dyer numero* 51. *Est une Maxime, Que un action sera touts faits conceive ou le plus meliour trial, et notice del fait poit este conus; et specialment lou de tort est personal*, with divers such like.

Sometimes they are called *Principles*, for so in the 8. *Hen.* 7. 4. *a* it is said, that it is *an Common Principle, que Terre (s. Estate de frank tenant) ne pas sans Livery de seisin.* Principles.

Likewise saith *Sanders* in the *Com. Colthurets Case*, 28. *b. Il ad este tenus come Principle, Que quand un fait Livery de seisin que son Livery sera pris plus fort vers luy.* *Vide Com.* 345. *a.*

Sometimes they have beene called *Eruditions*. In such sort saith *Keble*, in 11. *Hen.* 7. 15. *a. Ceo ad este un erudition, Que le partie navera Capias ad satisfaciendum, mes un Capias gist in l'original.* And some Eruditions. *Vide* 14. *H.* 8. 28. *a. Pollard* 24. *H.* 8. 40. *Dyer. nu.* 66.

in

3.E.4.7.4. Lit. in 29.Hen.8.40.a. Dyer numero 66. saith *Iustices Il est une Common Erudition, Que in cel Countie lou le tort commence, l'action sera porte.*

Vide 33. H. 6.54 a. 44. E.3.34.b.

Moreover, sometimes for their firmnesse they have beene called *Lawes Positive*, for so speaketh *Belknap*, 2.*Rich*. 2.*Fitzh. Accompt* 45. *Il est ley positive, Que home navera damages in breve d'accompt.*

Lawes positive.

Lawes.

Sometimes they are invested by the title of Law it selfe; for in such manner it is said, *Tempore Ed.* 1.*Fitzh. Grant*.41. *Lex est, cuicunque aliquid concedit, concedere videtur, & id sine quo res esse non potuit.* And so *Bracton* saith, 9. *Hen.* 6. 59.*b. Iay prise pur ley, Que si home plede un plee & preigne un protestation; et puis son plee est trove encounter luy, il naver unque advantage de son protestation.* Of which manner speech there are manifold examples.

Vide 9. H.4. 59.b. Paston.

So that be they named *Grounds, Maximes, Principles, Eruditions, Lawes Positive, Lawes, Rules* or *Propositions*, or by whatsoever other name they be called, let us now seek the nature of them by their Definitions.

*Li.*1.*F. de Reg. Iuris.* *Paulus* the ancient Romane Lawyer thus defines a *Principle* or Rule of Law: *Regula Iuris, rem quæ est, breviter enarrat, &c.*

Com. Colth. 27. If we doe respect the originall thereof together with the effect it yeeldeth; *Morgan* in the Commentaries of *Plowden*, thus defineth it: A maxime is the foundation of Law, and the conclusion of reason: for reason is the efficient cause thereof, and Law is the effect that floweth therefrom.

Such

Such of the Civilians as in the description of a rule of Law, doe onely respect the manner of the collecting of them from particular cases or circumstances, doe thus affirme; *Regula juris est multorum specialium per generalem conclusionem brevis comprehensio.* Or as *Ioachimus Hopperus* in his first booke *De juris arte*, though disagreeing in words, yet one in sense with the forme; *Regula juris sunt quædam conjectiones tantum, & breviaria ex pluribus speciebus in unum per commune aliquod collecta.* Another of them, in this manner; *Regula est sententia generalis, quæ ex plurimum legum mente à jurisconsultis notata atque animadversa, paucis verbis summam earum consentionem & tanquam harmoniam complectitur.*

Pratens de Reg. Iuris. lib. 6.

Ioach. Hopp. de Iuris arte. 371. a.

Sim. Shard. Lexic. Iuris Regal.

Matth. Gribaldus in his first booke *de ratione studij, cap. 7.* saith, *Regula juris nihil aliud sunt quam breves & compendiosæ sententiæ, ex pervagatis definitionibus perstrictæ, quo & minori labore discantur, & facilius distinctè memoriâ teneantur.*

Matth. Gribald. l. 1. c. 7. de ratione studij Iuris.

But binding our selves to no prescript rules of Art, for the better understanding of the same, we may describe a rule or ground of Law thus:

A Rule or Principle of the Law of England, is a Conclusion either of the Law of Nature, or derived from some generall custome used within the Realme, containing in a short summe the reason and direction of many particular and speciall occurrences.

Definition.

Notes collected out of Authors.

Paulus lib. ff. de reg. Iuris. *Regula juris est plurium compendiosa narratio, & quasi causæ conjectio.*

Nec absimile est quod Grammatici dicunt, eam esse multorum similium collectionem.

Ant. Mase de exercitio Iurispr. lib. 1. *In summa autem est, ac si quis, prædictis cum verbis Archid. dist. 3. & Reg. conjunctis, ita diceret, Quod Regula sit compendiosa definitio; seu cum Quintiliano, Universale vel perpetuale præceptum diversarum rerum, quasi sub unâ eademq; causâ cadentium universalitatem complectens.*

Joach. Hopp. de Iuris arte. l. 2. fo. 469. a. *Est Regula nihil aliud quàm plurium rerum & specierum in unam quasi summam conjectio.*

As touching the Division thereof, wee shall better observe how many principles and grounds there be by the due consideration of their causes from whence they spring.

All causes of every thing are either ĩternall or externall.

Internall are, the causes { Materiall, or Formall.

Externall are, the causes { Efficient and Finall.

De

De Cauſis.

Non ſolum ea quæ inſita ſunt cauſæ dicuntur, ſed etiam ea quæ extrinſecus ſumuntur, ut id quod motum affert & efficiens eſt. *Ariſt. 11 Met. c. 4. To. 23.*

Cauſarum quatuor ſunt genera. *Ariſt. l. 2.*

Vnum eſt forma atque eſſentia rei. *Dem. c. 11.*

Alterum eſt in quo ineſt neceſſitudo non abſoluta, ſed ex adjunctione; ſi alia quædam ſint, hæc eſſe neceſſe eſt. *To. 11.*

Tertium genus eſt id in quo ineſt rei efficiendæ vis primaria.

Quartum eſt finis cujus cauſa aliquid fit.

Nam ad interrogationem factam per verba, propter quid ſit aliquid, nihil aliud unquam reſpondetur, quam aliqua ex dictis quatuor cauſis: Inter quas tamen, finis eſt potiſſima, & quaſi aliarum cauſa: Materia enim non eſſet cauſa, niſi haberet formam; & forma itidem niſi ab agente introduceretur; Agens quoque non ageret niſi moveretur à fine; finis autem ipſe immobilis permanet: Eſt ergo primum movens, & prima cauſa, &c. *Aut. Maſa de exercitio Iuriſperitorum l. 1. p. 38. b.*

Materiall cauſe.

As touching the Materiall cauſe, matter, or ſubject wherein theſe grounds are converſant, the ſame are all thoſe things whereof debate may riſe betweene parties judicially: which are as well divine as humane. Inſomuch as *Iuris prudentia*, or the knowledge of the Law, is *Divinarum humanarumq; rerum ſcientia.* And hence proceedeth it, that all Grounds or Rules of the Law of England *Brall. lib. 1. cap. 4. §. 4.*

in respect of their matter which they do concerne are either such as are not restrained to any onproper or peculiar title of the Law, but as occasion serveth, are applyable unto every part, title, or tractate of the Law, as by the view and due consideration of examples following may bee made manifest; All which, being either conclusions of naturall Reason, or drawne and derived from the same, doe not onely serve as directions and Principles of the Law, but are likewise as Positions and Axiomes to be observed throughout all mans life and conversation; having their originall from those Arts that are necessary and behoovfull for maintenance of humane society.

Grounds borrowed out of Logicke.

And first of all concerning the Art of Logick; from thence the learned of our Lawes have received many principles, as wel out of that part which concerneth the Invention of Arguments, as of that which teacheth the disposing, framing, and the judgement of the same.

From the first part these may serve for example.

14 H.8.31.b *Idem non potest esse agens & patiens.*
28.H.8.10.b *Omne majus continet in se suum minus.*
n.37.Dyer. *Magis dignum trahit ad se minus dignum.*
Com.213.b. *In præsentia majoris cessat minus.*
Com.323.b. *Frustra fit per plura quod fieri potest per pauciora.*
9 H.7.24.a. *Turpis est pars quæ cum toto non convenit.*
Com.161.a. With many other such like, &c.

From

From the Judiciall parts of Logishe, these and divers others.

Qui negat confusè, negat confusè & distributivè. 2.R.3.7.a.
But how that saying may be understood, and in what sense it may be intended true, and in what not, peruse the case of 4.H.7.8.a. touching the travers of a suggestion of breach of the peace: where although the said Rule be not mentioned, yet the meaning thereof, by the case there debated is partly made manifest. Moreover, *Brian* borroweth the Sophisters verse, and maketh it a Ground to try whether an issue tendered be an expresse Negative or no, in 11.H.7.23.a.

Pra contradic: post contra. Pra post que subalter.
This likewise is derived thence, *Negativum nihil implicat.*

Out of Naturall Philosophy, these, with divers others, are deducted, that follow.

Vis unita fortior. Com. 307.a.
Est natura vis maxima. Com. 72.b.
Vltra posse non est esse, Com. 268.a.
Sublata causa tollitur effectus. Com. 294.a.
Vltra scire non est posse. With many other of like quality. 8.E.4.10.a.

Grounds borrowed out of Morall Philosophie;

FRom whence, as from a Fountaine, all Lawes doe flow; we doe observe these few following for an example; as,

Com. 244. a. *Qui sentit commodum, sentire debet & onus.*
14. H. 8. 6. a. *Volenti non fit injuria.*
Com. 501. a. *Sic utere tuo, ut alienum non ladas.*
13 H. 8. 16. a *Fraus & dolus nemini patrocinatur.*
14 H. 8. 16. a *Agentes & consentientes pari pœna plectuntur.*
14. H. 8. 8. a. *Summum Ius summa Injuria.*
Com. 160. b. *Vix ulla lex fieri potest quæ omnibus commoda sit: sed si majori parti prospiciat, utilis est.*
Com. 370. b.
Com. 48. b. *A vero non delinabit Iustus.*
Quod tibi fieri non vis, alteri ne feceris. With many more such like.

Grounds borrowed out of the Civill Law.

OVt of the Civill Lawes there are also very many Axiomes and Rules, which are likewise borrowed and usually frequented in our Law. For sith all Lawes are derived from the law of Nature, and doe concur and agree in the principles of Nature and Reason: And sith the Civill Lawes, being the Lawes of the Empire, doe bewray the great wisedome whereby the Romane estate, in the time it most flourished, was governed:

ned: Sith likewiſe the Law of this Land hath alwayes followed beſt and moſt approved Reaſon (which is alſo a type of humane wiſdome) it doth enſue of neceſſity, that great conformity muſt be betweene them. Which conformity may be made apparant partly by theſe (among ſome thouſand Axioms and Concluſions of Reaſon) following.

Qui tacit conſentire videtur. Com. 357.b

Vigilantibus & non dormientibus Iura ſubveniunt. 5.H.3.222.

Quod initio non valet, tractu temporis non convaleſcit.

Quando duo Iura in uno concurrunt, æquum eſt ac ſi eſſet in duobus. Com.168.a.

In æquali jure, melior eſt conditio poſſidentis. Com. 296.b.

Optima Legum Interpres eſt Conſuetudo. Com. 336.b.

Fruſtra Legis auxilium petet, qui in Legem peccat.

Ignorantia facti excuſat. 14.H.1.27.b.

Modus Legem dat donationi. Com.251.a.

Non eſt regula quin fallat. Com. 162.b.

Modus & conventio vincunt Legem. 1.H.3.33.b.

With others in manner infinite, written and publiſhed in the Latine tongue.

In the French alſo many other grounds there are in our Law, to be found agreeable in ſenſe and meaning to ſuch as are frequent and uſuall in the Civill Lawes, and there publiſhed in the Latine tongue, whereof alſo theſe following may ſerve for example. L. verum ff. tempus: ff. Pro hoc. L. ſedes de reſcript.

Nul prendra benefit de ſon tort demeſne.

Nemo ex dolo ſuo proprio relevetur aut auxilium capiet L. bona fides ff. de Reg. Iuris.

Homo ne ſera double charge pro une meſme duetie.

Bona fides non patitur idem ab eodem bis exigi.

Auxy

Auxy mult auctorities & voies que home ad a faire un fait, auxy mult auctorities & voies ad cesty a qui le fait est fait a ceo dessolver. 1. Hen. 7. 16. a.

L. nihil. ff. de Regul. Iuris. *Nihil est magis rationi consentaneum quam eodem modo unum quodque dissolvere quo constatum est.*

13. H. 8. 16. a in fine. *Le Common wealth sera prefer devant private wealth.*

Vtilitas publica privatorum commodis ante-ferenda. L. 1. ff. fin. & cap. 301.

Com. 260. a. *Le ley in chescun act adrespect al comencement.*

Halls case. *Origo rerum attendenda.*

Com. 259. b. Halls case. *Imagination de mente de faire tort, sans le act fait, nest punishable in nostre Ley.*

Com. 160. b. Throgm. case. *Affectus non punitur nisi sequatur effectus. Prateus lib. 3. c. 4.*

Intent dirct done plus tost quam parols.

Proferentis intentio & voluntas, magis quam verborum locutio examinetur. Prat. lib. 3. cap. 3.

Com. 304. b. *Quant divers choses sont fait a un mesme instant, & l'un ne poet prender effect sans l'auter; le common ley adjudger ceo de preceder & ensuer, que aptment doit preceder & ensuer in feasant l'entent des parties de prender effect.*

Vbi in Instrumento reperitur plures actus successive fuisse celebratos, semper fingitur ille actus praecessisse qui reddit actum validum. Nicholai Everard Topica Iuris loco 1.

Non attento ordine verborum, talis ordo presumitur qualis debet esse.

With many others to like purpose, if place did permit, or cause did require to observe the same: Yea many times when as no Ground or Rule is expres.

expreſſed in our Law, but that we may onely collect Caſes concurrent upon ſome Conformity of Reaſon: We ſhall find in the Civill Lawes a propoſition or rule which ſhall moſt aptly and moſt fitly expreſſe the ſame Reaſon in ſuch ſhortneſſe of ſpeech, as nothing ſhall ſeeme more ſufficient in that reſpect. And unto the which Propoſitions ſuch as are or may be framed by us in the French, cannot in excellency be worthily compared.

Grounds borrowed out of the Canon Law.

As touching the Canon Law. Foraſmuch as the ſtudies both of the ſame and of the Civill Law, are in ſort conjoyned by the profeſſors of both, what may be ſaid of the one, in this reſpect, may be verified of the other: Which as well by veiw of the title *De Regulis Iuris in Sexto Decretalium*, as alſo in divers other titles of the ſame Law, eſpecially in ſuch as are moſt uſuall for matters of debate in this Realme, as are thoſe of Excommunication, Mariage, Divorce, Legacies, Tythes, and ſuch like, will at large appeare.

Grounds derived from Vſe, Cuſtome, and Converſation of Men.

Finally, many Grounds and Rules of the Lawes of this Realme are derived from Common uſe, Cuſtome, and Converſation among men, Collected out of the generall diſpoſition, nature, and condition of humane kinde: Which Grounds

are of two natures; The one obſerved out of humane actions, the other out of uſuall and ordinarie ſpeech.

Principia externa propriè vocamus ea quæ in Communi hominum vita verſantur & ab experientibus & prudentibus animadvertuntur. Ioh. Hopper : de Iuris arte.

Hæc non tam ex ipſa hominis natura quam foris advenium, debentq́, non ex mente hominis aut animo, ſed ex Communibus vitæ moribus longo uſu & tractatione colligi. Ibidem. Hæc ſunt igitur illa quæ dico externa Principia, quæ ex communibus vitæ uſibus & moribus diligenter in hiſtoria obſervatis decerpuntur, quæq́, non tam ornine deſcribi, & Literis mandari, quam longa tractatione colligi, & per manus tradi poſſunt. Ibidem.

Of the firſt ſort are theſe, and ſuch like following.

Com. 545. a. Paramour. *Home eſt tenus deſtre prochein a ſoy meſme.*

Manxel. 6. a. b. *Le inclination de touts homes eſt de faire ou parler choſes pour leur gaine, & nient pour leur perde : Et de*

Com. 261. a. *ceux que violent gabber, de gabber pur advantage.*

Halls caſe. *Eſt le propertie de nature de preſerver luy meſme.*

8. H. 6. 19. b. Per Martin. *Quant home eſt partie, il ne poet eſſe Iudge indifferent a luy meſme.*

With many other of like qualitie, which the intendment of the Law deriveth and collecteth out of the uſuall condition, nature, and qualitie of things upon the probabilitie and likelihood of occurrences often or for the moſt part hapning and falling out.

Axiomes

Axiomes or *Propoſitions* of the ſecond ſort, are drawne from the phraſe of ſpeech, and deduced from the ordinary manner of Conference by talk among men moſt uſuall in all places, As are the common and ordinarie Proverbs and proverbiall Aſſertions, and ſuch like; the which, as well by reaſon of their ordinary and often uſe in talke; as alſo for their probabilitie and likelihood of truth have been ſometime uſed as Axiomes, Principles, and Grounds of the Law; and are to bee found confirmed with many Caſes, having beene uſed as reaſons in the ſame: Whereof theſe few enſuing may ſerve for example.

Proverbiall Grounds.

Proverbium vulgò interpretatur probatum verbum, cum dicatur quaſi Commune omnium verbum. Proverbia verò citata, inſtar jurium haberi traditum eſt. L. ſolent. ff. de officio Procurat. Sim. Shardus Lexicon Iuris.

Da tua dum tua ſunt; poſt mortem, tunc tua non ſunt.

Com. 280. a.

Qui ambulat in tenebris, neſcit quò vadit.

Com. 173. a.

Neceſſitas non habet Legem.

Com. 18 b.

As good never the whit, as never the better.

29. Eliz. 356. a.

Let him that is cold blow the coale.

14 H. 8. 23 a

One to beat the buſh, and another to take the birds.

With many other ſuch like ſpeeches, which although they are of ſmall moment, being every where ordinarie; yet nevertheleſſe for the perſpicuity and plainneſs, they have heretofore, at ſome times, in Law arguments beene uſed, and fitly applyed in debate of Caſes (although not *ad probandum*, yet *ad illuſtrandum*) and ſo likewiſe may at any time hereafter, upon like occaſion offered, without blame be frequented.

Although theſe generall Poſitions, Maximes & Rules propoſed, and ſuch like, cannot be properly reduced (as aforeſaid) under any one peculiar title

of the Law, extant in any Abridgement, Table, or directorie; yet nevertheleſſe may they be brought under generall titles or common places, to bee framed of purpoſe, as hereafter in place more convenient ſhall be declared.

And thus much therefore of generall Grounds or Maximes.

Maximes appliable onely to one title.

Now followeth to ſpeake of ſuch as are to bee reduced under one particular title, tractate, or matter of the Law, ſerving to no other uſe, but onely doe concerne the ſaid ſpeciall matter, and cannot bee transferred thence, neither may properly ſerve any other then their native place, unto the which they are wholly and alonely to bee referred: As for example,

Vnder Grants theſe.

T.E.1.Fitz. Grants. *Quando aliquis quid concedit, & id etiam concedere videtur, ſine quo res conceſſa eſſe non poteſt.*

36. Aſſ. p.3. *Grant ſera priſe plus fort vers le Grauntour, &c.*

Vnder Contracts theſe and ſuch like.

Ex nudo pacto non oritur actio. Com. 5.a. Com. 302.a. Com. 305.a. Com. 321.a.

17.Ed.4.1.a. *Contract ne poit eſtre, ſi ne ſoit que cheſcun partie ſoit agree.*

Vnder Prerogative, theſe and ſuch others.

Nullum tempus occurrit Regi. Com. 243.a. 261.a. 321.a.

Le

Le Ro, d auxy un Prerogative en le forme de bref s port per luy, differen: de ceaux que common perſon ad, &c. *Vide* 18. *Ed.* 3. 2. *a.*

Vnder Deeds theſe.

Fiunt aliquando Donationes in ſcriptis, ſicut in chartis, ad perpetuam memoriam, propter brevem hominum vitam, & ut facilius probari poſsit Donatio. *Bract. li.* 2. *c.* 16. *f.* 33. *b.*

Choſes incident que per lour meſme ne poient eſtre grant ſans fait, uncore ils paſſeront oue le principal a qui ſont incident ſans fait. With divers other in every title of the Law of like effect. *Brudnel. Vid. Lit.* 183 21. *H.* 7. 37. *b.* 14. *H.* 8. 22. *b*

The divers kinds of Grounds which doe concerne one title.

Theſe ſpeciall Grounds are of divers ſorts: for ſome concerne the very nature and eſſence of the title: ſome the conſequents and incidents annexed thereunto. Thoſe which doe concerne the nature of the thing, doe flow from ſome of the cauſes thereof, as the Materiall, the Formall, the Efficient, or the Finall. Some from the generall notion; others from the ſpecial difference; and ſome doe proceed from the effect. Thoſe which doe proceed of the conſequents, concerne either the Incidents inherent and inſeparable, or the adjuncts, and ſuch like.

Which grounds ſo drawne, if they be orderly diſpoſed with al their ſubdiviſions, and particular Rules, and the ſame furniſhed with apt caſes, will make a perfect and exact treatiſe of ſuch matter as concerneth that title, reſembling thoſe treatiſes compiled, by *Littleton*, *Parkins*, *Stanford*, of the Pleas of the Crowne, and others of like forme.

Arbitrement.

But in this place not intending to combine any ſuch Grounds as do concerne one title or matter, or thereof to endeavour to draw a type of any perfect treatiſe, it ſhall be ſufficient at this preſent, for example onely, to expreſſe that which is here meant, by the diſpoſing of ſome few Grounds of the title of Arbitrement, according to the obſervation above mentioned, that thereby might bee conceived, how ſuch like Grounds concerning one title or matter doe flow from the cauſes and conſequents of that title, whereunto they are applied; and that a coherency of them might be both found and orderly framed for the more certaine obtaining of knowledge in obſerving this, or the like courſe to this hereafter following.

Firſt although we find not an Arbitrement to be defined in any report of our Lawes; yet nevertheleſſe *Raſtall* in the ſmall treatiſe of the Termes of the Law, thereof yeeldeth this deſcription,

Arbitremẽt, *quid?*

Arbitrement eſt un award, determination, ou judgement, quel pleuſieurs font al requeſt de deux parties al meins, pur, & ſur aſcun dett, treſpas, ou auter controverſie ewe perenter les dits parties. But more artificially it may be deſcribed out of the Civill Law thus:

Arbitrium eſt Arbitri ſententia ſive Iudicium inter controvertentes; privato conſenſu, non autem publica interveniente authoritate, datum.

Out of the bookes of Reports of the Lawes of this

this Land this full deſcription may be drawne.

An Award is a judgement 8. *E.* 4. 1. 8. *Ed.* 4. 10. *a.* 21. *Ed.* 4. 39. *a.* given by ſuch perſon or perſons as are elected by the parties unto the controverſie, 9. *Ed.* 4. 43. *b. Fairfax.* 16. *Ed.* 4. 9. *a.* for the ending and pacifying the ſaid controverſie. 8. *Ed.* 4. 10. *a* 19. *Hen.* 6. 37. *b. Askewe.* according to the comprimiſe and ſubmiſſion. 19. *Edw.* 4. 1. *a.* and agreeable to reaſon and good conſcience. 19. *Hen.* 6. 37. *a.*

Touching the Etymology or notation of the names thereof, it ſeemeth to be called an Arbitrement, becauſe the Iudges elected therein, may determine the controverſie, not according to the Law, but *Ex boni viri Arbitrio.* Or elſe perhaps becauſe the parties to the controverſie have ſubmitted themſelves to the Iudgement of the Arbitrators, not by compulſary meanes, and coertion of the Law, but *Ex libero Arbritrio ſuo,* of his own accord. It is called an Award of the French word *Agarder,* which ſignifies to decide or judge. It is in the Saxon or old Engliſh ſometime called a *Loveday,* for the quiet and tranquility that ſhould enſue thereof, and for the ending of the cauſe which is wrought thereby. The Etymologie. 1 2 3 4

The Materiall cauſe whereabout it is converſant, is the controverſie, which The Materiall cauſe.

1, Firſt, may be either action, ſuit, quarrell, or demand; and the

2 Second that, concerning dutie or demand, either perſonall, reall or mixt, or every of them.

The Formall cauſe is, the forme and manner of the

The formall cause. the Award, or the yeelding up of their judgement, according to reason, intent and good meaning.

The efficiēt cause. The Immediate efficient cause, is the Arbitrator or Arbitrators.

The Mediate efficient cause, is the comprimise or submission, and the parties at variance, being also parties to the submission. Wherefore for the more brevitie we will discourse of every of these last recited, when we shall discover the power of the Arbitrator.

The finall cause. The finall cause, is both to appease

1, First, the debate and variance so risen betweene the parties, and compromitted; and also to reduce

2, Secondly, that which was before uncertain, unto a certaintie.

So that by these you see, that those five things which are found to be incident to every Award, *viz.*

1 First, *matter de controversie.*

2 *Submißion.*

3 *Parties al submißion.*

4 *Arbitrators*, and

5 *Render sur del Iudgement*, spoken of in 4 *Eliz. Dyer* 217. *a.* are here reduced into a methodicall consideration of the causes of every Award, seeing indeed, they and no other are the very causes of the same.

Genus. The *genus* or generall notion of the former description, is, that it is a Iudgement.

Differentia. The speciall difference whereby it is distinguished

ſhed from other Iudgements, and expreſſed in the ſaid deſcription, is, that it is given by Iudges elected by the parties, and not by coertion of the Law.

The effect is, when it concerneth any payment of money, to alter, change, and make the controverſie *tranſire in rem judicatam*, and thereupon to give action for the ſumme awarded. The effect. 1

If it doe determine any collaterall or other matter than payment of money to bee made or done, then it is not compulſary to conſtraine the parties to performe it; but every of them is reſtored to his former action. Except the compromiſe or ſubmiſſion be by deed; and ſo therein it reſteth wholly upon that ſecurity by bond, covenant, ſtatute, or recognizance, by the which the parties compromitted themſelves. 2

The Adjunct, is the performance thereof and the manner how, which whether the Award bee performed or not, it maketh nothing to the nature and ſubſtance of the Award it ſelfe. But nevertheleſſe ſuch performance of the Award is a requiſite conſequent annexed to the conſideration of the nature of an Award. The Adiunct.

Theſe, the generall cauſes of an Award, thus conſidered; next followeth the conſideration of the grounds that flow from every of them.

From the Materiall cauſe which is the controverſie, theſe Grounds or Rules are deduced. Materiall cauſe.

In Reall matters, *que conſerne franke tenement, Arbitrement ne lia, le title, ne done ceo. 14. Henr. 4. 19. 4.* Reall Matters

In matters of Realty, which concerne freehold, an Arbitrement doth neither give title, nor binde the right.

Reall Actions. *In Reall Actions, un Arbitrement nest plee.*

Mixt Actions. *In Mixt Actions, Arbitrement nest plee: Si non que le Comprimise soit per fait.* 19. *Hen.* 6. 37. *b. Newton.*

Personall Actions. *In Personall Actions sur personall torts, Arbitrement est plee, coment que le submission ne sott per fait.* 14. *H.* 4. 24. *b. Raulsh gard.*

Reall Chattels *In controversie concernant le propertie de Reall chattels, un Arbitrement transfer propertie de ceo accordant al agard.* 21. *H.* 7. 29. *b.*

Personall Chattells. *In Chattels personall, Arbitrement transfer propertie.*

Personall dutie. *In Personall dutie grounde sur specialtie, Arbitrement nest availeable.* 3. *H.* 4. 1. *b.* 8. *H.* 5. 3. *b.*

Matters de Record. *In Controversie grounde sur matter de Record, Arbitrement ne sera regard.* 6. *H.* 4. 6. *a.* 8. *Hen.* 5. 3. *b.* 4. *H.* 6. 17. *b.*

Dutie in certaine. *Arbitrement doet este de dutie vient certaine.* 6. *Hen.* 4. 6. *a.* 2. *Hen.* 5. *Fitzh.* 23. 4. *Hen.* 6. 17. *b.* 10 *Hen.* 7. 4. *a.*

Controversie de dett solement, ne poet este mise en Arbitrement. 45. *E.* 3. 16. *a.* 2. *H.* 5. *Fitzh. Arbitrement* 23. 8. *H.* 5. 3. *b.* 4. *H.* 6. 17. *b.* 10. *H.* 7. 4. *a.*

Dett. *In Contract de dett une autre chose mise en comprimise Arbitrement sera bone.* 2. *H.* 6. *Fitzh. Arbitrement* 23. 4. *H.* 6. 17. *b.* 10. *H.* 7. 4. *a.*

Dett. *Dett sur Contract sans specialtie, per le resolution de ascuns liurt poet este mise en Arbitrement.* 45. *E.* 3. 16. *a.* 6. *H.* 4. 6. *a.* 4. *H.* 6. 18. *a.*

These

These with divers other grounds, doe proceed, as we have said, from the Materiall Cause or controversie.

There resteth now to speake of such as do proceed from the Formall Cause. Formall Cause.

Every Award, as touching the forme thereof, ought to have these foure qualities.

1. First, that it be not a thing impossible to be performed by the parties.

2. Secondly, that it doe not ordaine matter unlawfull to be done.

3. Thirdly, that the same Award agree with reason and good meaning.

4. Fourthly, that it be sensible, full, and perfect in understanding.

As touching the first.

1. *Arbitrement ne doet este de chose ou matter impossible.* 8. *E.* 4. 1. *b. Moyle.* 8. *E.* 4. 10. *a. Yelverton.* 19. *E.* 4. 1. *a. Neele.* 9. *H.* 7. 16. *b. Keble.* Impossible.

2. *Arbitrement ne doit este de chose encounter ley.* 19. *Edw.* 4. 1. *a. Neele.* 21. *Ed.* 4. *b. Bridg.* 9. *Hen.* 7. 16. *a. b. Keble.* Encounter Ley.

3. *Arbitrement ne doet estre unreasonable.* 46. *E.* 3. 16. *a.* 43. *E.* 3. 17. *b.* 2. *H.* 5. 2. *a.* 17. *E.* 4. 5. *b.* 9. *H.* 7 10. *b. Keble.* 46. *E.* 3. 17. *b.* 21. *E.* 4. 40. *a.* 10. *H.* 4. *Fitzh. Arbitrement.* Vnreasonable.

This Ground last remembred, being generall, containeth therein many speciall Rules under it; whereof some doe follow.

Arbitrement doet este tiel que les parties poient per-

Satisfaction sans assistance des auters.

former ſans le aſſiſtance de aſcunes auters queux ils ne poient compel a ceo faire & performer. 8.Edw.4.2.a. Illingworth. 17.Edw.4.15.b. 18.Edw.4.23.a.Cateſby. 19.E.4.1.b. Brian.

Assistance des auters.

Mes ſi les parties ont mean per le ley a compeller tiels eſtrangers a ceo performer, le Agard eſt aſſetts bone. 17.E.4.5.b.

Iudiciall Act.

Arbitrement que le party faire un judiciall Act eſt bone, coment que il ne poiet ceo performe ſans aſſiſtance del Court.19.H.6.38.a. Paſt.Nonſuite. 19.E.4 1.b. Brian.fine. 12.E.4.8.a. Retraxit. 22.E.4.38.a. Retraxit. 5.H.7.22.a.b.Diſcon.&c.

Satisfaction.

Chaſcun Arbitrement q. ne import ſatisfaction del tort que eſt miſe in comprimiſe, neſt bone.43.E.3.28. b. Finchd.46.E.3.17.b. 2.H.5.2.a. 45.E.3.16.a. 19.H.6.38.a. Paſt. 22.H.6.39.a. Port. 30.Hen.6. FitZherbert Arbitrement.27.9.E.4.44.a.Chock.9.H. 7.16.b. 12.H.7.15.a.

This Ground is alſo generall: Wherefore it ſhall be expedient to divide it by the particular circumſtances of caſes unto more eſpeciall propoſitions, together with their ſeverall exceptions to be ſet downe in manner following.

Redeliuerie des biens.

Arbitrement in tiel maner, que pur ceo que un des parties ad les chattels del auter, que il eux redelivera, ceo neſt ſatisfaction. 45.E.3.16.a. Kirton. 2.Hen.5. 2.a. 12.H.7.15.a.

Redeliuerie des biens.

Mes ſi ſur le delivery des biens, ceſty a que ſont deliver poet aver aſcun benefit, per tiel delivery in ſatisfaction del tort,donque eſt le Arbitrement bone.2.H. 5.2.a. 14.H.4.14.b. 12.H.7.15.a.

Parte del Choſe.

Arbitrement que un partie avera un partie del choſe com-

comprimiſe, & ſur que le controverſie fait, & l'auter partie eſt void. 45. E.3. 16. a. 10. Hen.4. Fitzh. Arbitrement 19.

Arbitrement que le partie payera part de ſa dett, eſt void. 45.E.3.16.a. — *Part del Choſe.*

Arbitrement ſur matter de dett, ſils agard que le parties endebted payera plus que il doit in recompence del dit dett ceo eſt void. 9.H.7.16.b.Keble. *Plus que il doit.*

Arbitrement que ceſty que eſt ſuppoſe daver fait treſpas, faira de ceo ſon Ley, & ſur ceo ſera diſcharge, neſt ſatisfaction al auter, & pur ceo neſt bone. 46.Ed. 3.17.b. *Gager de Ley*

Arbitrement que in ſatisfaction del tort que les parties entermarient, ceo neſt bone agard; car neſt ſatisfaction. 9.E.4.44.a.Chock. Entermariage.

Arbitrement que un des parties que eſt in arrerages in accompt accomptera al auter, ceo neſt ſatisfaction. 30.H.6. Fitzh. Arbitrement 27. *Accomptera*

Arbitrement que les parties ſera act a tiel jour, & devant que le agard eſt perfect, le jour eſt paſſe tiel agard neſt bone. 8.E.4.11.a. 8.E.4.22.a. *Iour paſſe.*

Arbitrement que refer le feaſance del choſe ou auter matter a tiel choſe q; neſt in Rerum natura; tiel arbitrement eſt void. 21.E.4.40.a. 9.Ed.4.44.a. 39.H. 6.10.a. *Non in Rerum Natura.*

Having thus ſhewed the Circumſtances of certaine Arbitrements, which have beene taken to be againſt reaſon, ſounding to no ſatisfaction, and therefore voyd: Now reſteth to be ſhewed certaine circumſtances, in Arbitrements agreeable unto reaſon, and imparting ſatisfaction, and therefore deemed good. *Reaſonable.*

Equall. Arbitrement doet eſte equal in reſpect d'ambideux parties, & l'un come l'auter ſera lie a ceo. 7.H.6. 41.a. Strange. 19.H.6.38.a. Newton. 20.H.6.19.a. Newton. 39.H.6.12.a. Moyle.

Enter aſcuns des Parties. Lou divers d'une parties & d'auter eux ſubmit al agard, & le Arbitrement eſt, que l'une de l'une partie payera a un auter de l'auter partie tant, ſans rien parler des auters ; ceo eſt bone agard, pur ceo que poet eſte que le auters naveront cauſe daver aſcun choſe. 22.E. 4. 25.b.

Quitt. Arbitrement pur ceo que les torts fait per les parties cheſcun al auter ſont equal que ils ſeront quit cheſcun vers lauter; ceo eſt bone agard. 19.H.7.37.b. Newton. 20.H.6.19.a. Newton. 21.H.6. Fitz. Arbit. 9.

Quitt. Arbitrement que une des parties ſera quit vers lauter, & que ceſty auter payera ou faira tant pur ceo que ſon treſpas fut le greinder, eſt bon agard. 10.H.6. 4.a. 20.H.6.19.a. Newton.

Petit Recompence. Arbitrement que l'une done al auter quart de vine, ou tiel petit recompence pur ſatisfaction del tort, eſt bone agard, 43.E.3.33.a. 45.E.3.19.b Belknap. 9.E 4.44. a. Nedham.

Greinder value que le tort. Si le Arbitrement ſoit, que un des parties payera greinder ſum in value que le tort eſt que il ad fait, uncore le agard eſt bone, & ceo giſt in diſcretion des Arbitrators, 8,E,4,21, Chock.

Releaſe. Arbitrement, que cheſcun releaſe al auter, eſt bone, 9,E,4,44,b, Danby.

Releaſe. Arbitrement que l'une releaſe tout ſon droit in tiel terre, eſt bone ſatisfaction : Si ceſty a q̄ le releaſe ſera fait ſoit in poſſeſſion del terre, &c. Et ceo appiert per le agard, 9,E,4,44,b. 21,E,4,40,b.

Ar-

Arbitrement q. l'une partie done al auter tiel chose comment q. le partie nad tiel chose, uncore est le agard bone, & il doit provide ceo, 19, *E*, 4, 1, *a*, *Neele*. 9, *Henr*: 7, 16, *a*. *Doner ceo que il nad.*

Arbitrement bone in part, & void in part, 19, *E*, 4, 1, *a*. *Bone in part &*

Arbitrators poient ordaine act deste fait in lour agard pur le melieur securitie del performance de ceo, come obligation, 8, *H*, 6, 18, *b*, *Newton*. 19, *H*, 4, 1, *a*, *Chock*. *Security del Agard.*

Chescune Arbitrement doet este plaine & certaine en sence, 8, *E*, 4, 11, *a*, *Pigot*. Certaine.

Arbitrement est chose entier, 18, *E*, 4, 23, *a*, *Brian*. Entier.

Thus much touching the Matter and Forme of Arbitrements and the Axiomes, Grounds and Rules deduced from the same: Wherein we have not expressed every Rule that might be found in the books, or collected thence, tending hereunto: Neither are those Axiomes or Propositions here put downe, furnished with all those cases that might be thereunto applyed: For, not intending to expresse the type of any treatise of this title, but onely a methodicall Abstract or Directory, that which is here exemplified in part may be sufficient to expresse our meaning before declared. But to proceed.

The Efficient Causes, and the Rules drawne from the same come next to consideration. Efficient Cause.

The first whereof is the Arbitrator: Of whom the Authour of the Institutions of the Canon Law giveth this description: *Arbitri dicuntur proprie, qui (nullam potestatem habentes ex Lege,)* *Iohannes Paulus Lancelottus.* *Arbitrator conquid.*

consensu Litigantium in Iudices eliguntur: in quos compromittitur, ut eorum sententia stetur.

Out of the bookes of the Common law, a description of an Arbitrator may be thus collected.

Vne Arbitratour est Iudge private, eslew per les parties. 9. Edw. 4. 43. b. Fairefax. 16. Edw. 4. 9. a. Feneux. 19. Hen. 6. 37. b. Askew. pur appeaser les debates enter eux. 8. Edw. 4. 10. a. Billinge. Et de arbitrate & adjudge selonque lour bone intent. 19. H. 6. 37. a. Paston.

Sithence in the Award it selfe, the Law requireth such qualities, there hath not beene made many nor scarce any question, who may be an Arbitrator, and who not: Neither (considering what hath beene said touching the forme of an Award) should it be greatly necessary. Therefore we wil proceed, respecting in the Arbitrator these three things.

1. First his Ordinance, from whom it is.
2. His Authority, what it is.
3. His Duty, wherein it consisteth.

Ordinance. Touching his Ordinance, hee is ordained by these two things:

1. First, by the election of the parties. 20. *H. 6. 41. a.*
2. By his owne undertaking of the charge. 8. *E. 4. 10. a. Billinge.*

Authoritie. Touching his Authority, what it is.

1. First it is derived from the submission, and extendeth no further.
2. Thereby hee is a Iudge betweene the parties.

3. And

3, And therefore he cannot transferre his authority over to any other.

Touching his Duty, it consisteth in these three. Duty.

1, First to heare the griefe of the partie.

2, To judge according to equitie.

3, To notifie their Award.

First therefore concerning the election of the Arbitrators by the parties to the Controversie (which ought likewise to bee parties to the Submission) there is first of all to be considered, what persons may by the Law submit themselves to an award made by others, and what persons cannot. Election of the Arbitratour. *Queux persons poient eux submitter al agarde.*

And therefore, Deputy.

Si l'une des parties submit luy a une Arbitrement d'une parte, et Depute del auter parte in noſme del dit auter party : Arbitrement ſur ceo fait per enter eux ſemble bon. 4. Eliz. 217. a. 60.

Le Baron poet luy meſme ſubmit al agard pur luy et ſa feme pur chattels des queux il ad le diſpoſition in droit, et per reaſon de ſa fem, et ceo Liera la feme. 21. Hen. 7. 29. b. Baron & feme.

Si enfant ſubmit luy al une agard, il ſera lye de ceo performer cy bien come home de plein age. 13. Hen. 4. 12. a. 10 Hen. 6. 14. a. Enfant.

Si divers d'une parte ont fait tort a un auter, & ceſti a qui le tort eſt fait, et un de les auters ſubmit eux al agard, de ceſt agard fait les auters nient parties al ſubmiſſion averon advantage in extinguiſhment del tort. 7. Hen. 4. 31. b. 20. H. 6. 12. a. 20. H. 6. 41. a. Aſeuns des parties.

Si divers del une parte ſubmit eux meſmes al agard de certaine perſons, & divers del auter parte : Les Arbitratours ont power de faire agarde pur matters Joynt & ſeverall.

enter eux joyntment, & iſsint pur matter enter eux ſeveralment, 2. *Rich.*3.18.*b.* *vide* 21.*Hen.*7.29.*b.* *Com.Dalton.*289.*b.*

Aſcunes des parties. *Si divers del une parte & de auter ſubmit eux al agard del une, que fait agard perenter aſcunes d'une party, & aſcunes del auter party & nemy perenter eux touts, & ne parle rien en ſon agard des auters, uncore tiel agard eſt bone*, 22.*Edw.*4.25.*b.*

Thus much touching the parties that doe ſubmit themſelves unto an Award, and which make an election of the Arbitratours. Now followeth that ſomewhat be alſo ſaid as touching the undertaking of the charge of the ſaid Award.

vndertaking the award.

Del parcel. *Si le Arbritr atour proteſt, que il ne voile meddle ave tout ceo que eſt commit a luy, ou conteyne en le ſubmiſsion, ou ſil fait agard tantum del parcel, le agard eſt bone*, 19.*Hen.*6.6.*b.* 39.*Hen.*6.11.*b.* *Priſot*, *cont.* 4. *Eliz.*217.60.7.8.*Eliz.*243.*b.*52.

Parcel. *Mes ſi le ſubmiſsion ſoit per fait conditionalment que le dit agard ſoit deliver devant tiel jour: une Arbitrement de parcel neſt bone*, 4.*Eliz.*217.60.7.8.*Eliz.* 243.*b.*52.

Parcel. *Mes uncore, ſi le ſubmiſsion ſoit que ils eſtoieront al agard des Arbitratours de tout le choſe comprimit ou fait pur aſcun parcel de ceo: donque le Arbitrement eſt bone pur parcel*, 39.*Hen.*6.11.*b.*

And thus much hath beene ſaid of the taking upon them of the charge of the Arbitrement.

Now reſteth it likewiſe to ſpeake of the Authoritie of the Arbitrators themſelves: which is, as before is declared, grounded upon the ſubmiſsion.

The

The ſubmiſſion or comprimiſe therfore out of the Civill Law, is thus defined;

Compromiſſum eſt ſimultanea illa partium promiſſio, qua ſua ſponte, ad alicujus boni viri Arbitrium ſuam remittunt controverſiam. Compromiſe ou ſubmiſſion.

Submiſſions are in two manners, either by writing, or by word.

Thoſe that are by writing, are either by obligation, or by covenant.

Which obligation is either of Record, as a recognizance, or by deed betweene the parties.

And this ſubmiſſion by writing, or by word, is either abſolute, or conditionall, ſo that the award be delivered by a certaine day, or ſuch like.

Wherefore in as much as the authority of the Arbitrator is deduced from the ſubmiſſion, it followeth that,

Le Arbitrement que eſt fait de choſe nient contain in le ſubmiſſion, eſt voide, 7. Hen. 6. 40. b. 19. Hen. 6. 39. b. Fort. 9. Ed. 4. 44. a. Chock. 19. E. 4. 1. a. Ntele. 7. 8. Eliz. 242. b. 52. Nient containe in ſubmiſſion.

Mes ſi le ſubmiſſion eſt de choſe perſonal, les Arbitrators poient agard, que un des parties fera act que eſt de choſe real in ſatisfaction der perſonal tort, 9. Ed. 4. 44. a. Brian. Nient containe in le ſubmiſſion.

Si le ſubmiſſion ſoit de choſe real, les Arbitratours poient agard ſatisfaction deſte fait de choſe perſonal, 9. E. 4. 44. a. Brian. Real.

Si les arbitratours agard, que un des parties fera act al eſtranger, come feofment, ou tiels ſembles, tel arbitrement eſt void, 22. Hen. 6. 46. b. 17. Ed. 4. 23, a. Catesby, 19. Ed. 4. 1. b. Brian. 5 Hen. 7. 22. b. Eſtranger.

Incident. *Si le ſubmiſſion ſoit d'une choſe, le Arbitrement poit eſſe fait de choſe incident a ceo. 8 Hen. 6. 18. b. 19. Ed. 4. 1. a. Chock. ver. 9. Hen. 7. 15 b. 16. a.*

Vpon this authority given to the Arbitrators by the ſubmiſſion, to deale in manner as aforeſaid, in things touching the ſame ſubmiſſion.

Iudge. It enſueth alſo ſecondarily, that

Le Arbitrator eſt un Iudge perenter les parties, 19. Hen. 6. 37. b. Aſcongh, 9. Ed. 4. 43. b. Fairf. 16. Ed. 4. 9. a. Iency. Com. Fogaſta. 6. a.

Wherefore likewiſe it enſueth that the Arbitrator being a Iudge cannot transferre that his Iudiciall authority to any other.

And therfore,

Eſtranger. *Si le Arbitrement ſoit, que les parties eſtoiera al arbitrement d'un eſtranger; ceo neſt bone agard, 47. Ed. 3. 21. a. Cont. 8. Ed. 4. 10, 11. a.*

Eſtranger. *Mes ſi l'eſtranger adfait un Arbitrement devant perenter les dits parties, le Agard pur eſtoier a tiel Arbitrement del eſtranger eſt bone, 39. Hen. 6, 10. a. 11. a.*

Eſtranger. *Mes ſi le Arbitrement ſoit que les parties perfomera le Agard d'une auter devant fait perenter meſmes les parties, lou in verity neſt aſcun tel agard: uncore ceſt Arbitrement eſt bone prima facie tanque ſoit monſtre que neſt tiel agard, 39. Hen. 6. 12. a. Priſot.*

Advice. *Mes uncore ſi le Arbitrement ſoit, que une act limit per le Agard ſera fait per le adviſe & counſeil d'une auter perſon; tiel Agard eſt bone, 8. Ed. 4. 11. a. 14. Ed. 4. 1. a. Chock.*

Advice. *Mes ſi le Agard ſoit, que le act ſera fait per le Adviſe del Arbitratour meſme apres le Agard rendu*

ſur

ſur tel Agard neſt bone, 19. Ed.4. 1.a. Chock.

Si les parties eux ſubmit al Agard de certaine perſons, & s'ils ne poient agree, donque al ordinance d'un auter come umpier: ſi les Arbitratours font Agard de parcel, le umpier ne fera agard del auter parcel remnant, 39. Hen.6. 10.a.b. *Vmpier.*

Mes ſi le ſubmiſſion ſoit tiel que le umpier fera Agard del tout ou parte, donque il poit faire Agard de ceſt parte, oveſque que les Arbitrators navont medle, 39. Hen.6. 11.b. Priſot.

Now as touching the duty of the Arbitratours. *Duty.* Firſt

Les duties des parties eſt a vener devant les Arbitratours & monſtre lour grieves.

1 *Et le Arbitratour doit eux oir.*

2 *Et ſolonque ceo adjudge, ou autermẽt il neſt bone Iudge, 8. Ed.4. 10.a. Billinge.*

Thoſe which affect the Method of *Ramus* (that is, to begin with the efficient cauſe, as here, with Arbitratour) rather then that which is uſually proſecuted by the Interpretors of *Ariſtotle* (namely, to begin firſt with the matter and forme, which we hitherunto have endeavoured to follow) may here adde to, the ſecond part of the duty of an Arbitrator (that is, to that which hath beene here ſaid of this Iudiciall Authority and Iudgement) as much as hath beene before, firſt of all, ſhewed by us, touching the Materiall and Formall cauſes, and the Grounds and Rules incident thereupon.

But nevertheleſſe, to proceed with our intended enterpriſe; touching the third part of the dutie of an Arbitrator, *viz.* the publiſhing or notifying

fying of his Award; It is to be considered that the publishing or notifying of an Award is either provided for and ordained by the submission it selfe; or else it is left and permitted to the discretion of the Arbitrator.

If it be provided for, by the submission; for the most part it is in this manner, that either the same Award made, be notified to the parties, or some of them; & that, either by a certaine day or time, or else without limitation of any time.

As concerning therefore the delivery of the Award, there is to be noted; that where such provision is made of notification by the submission, that then;

Pronounce. *Arbitrement nest Arbitrement devant que il soit pronounce*, 8. *Ed.* 4. 21. *b. Chock.*

Delivery de Agard. *Lou per le submission est ordaine ou provide condicionalment, que le agard soit deliver, ceo nest ascun arbitrement in ley devant que il soit deliver in fait*, 8. *Ed.* 4. 11 *Telverton.* 8. *Ed.* 4. 21. *a. Chock. vide* 1. *Hen.* 7. 5. *a.* 37. *Hen.* 8. *Browne, Conditions*, 46.

Delivery. *Mes si le submission soit que le agard sera delivere al parties, &c. devant un jour hoc petentibus, mes nul certaine jour limit quand doit este deliver, les parties doient prender notice del agard a lour perill*, 8. *Edw.* 4. 1. *b.* 21, *&c.*

Delivery. *Si divers d'un partie & divers de auter party submit eux al Arbitrement de un auter, proviso, que il soit deliver al parties, ou a un de eux: ne besoign al Arbitrator a deliver ceo a ambideux del un partie ou a un de chacuns partie: mes suffist si soit deliver al ascun des dits parties*, 4. 5. *Eliz.* 218. *b.* 5.

Si

Si le ſubmiſſion ſoit que le Arbitrement ſera deliver devant tiel jour, il poet cy bien eſte deliver per parol come per fait : ſi non q̄ le ſubmiſſion ſoit q̄ il ſera per fait,4.5.Eliz.218.b.5. Delivery.

Si le ſubmiſſion ſoit q̄ le Arbitrement ſera deliver ceo poet eſte fait in un County, & deliver in auter County,5.Hen.7.7.a. County & lieu del delivery.

Si le ſubmiſſion ſoit per fait, & le temps pas in q̄ le Arbitrement doet eſte fait, les parties ne poient proroge le temps ouſter pur faire le agard ſans novel ſubmiſſion a tel entent,49.Ed.3.9.a. Temps.

Mes ſi le ſubmiſſion ſoit ſans fait, les parties poient proroge le temps q̄ fut done pur faire le agard, 49.Ed. 3.9.Fitzh.agard, 22. Temps.

Si les Arbitrators font lour agard perenter les parties un jour, ils ne poient faire auter agard perenter les parties un auter jour, coment q̄ le temps don per le ſubmiſſion ne ſoit expire,22.Hen.6.52.a. vide 33.H. 6.28.b. Temps.

Arbitrement ne poet eſte fait parte a un temps, & parte al auter, coment q̄ ſoit deins le temps del ſubmiſſion,39.H.6.12.a.Danby,8.Ed.4.10.b.Fairfax, 19. Ed.4.1.a.Chock, vide 3.Hen.4.1.b. Temps.

Mes les Arbitrators poient Common enter eux meſmes, & agree ſur un choſe un jour, & de auter choſe auter jour, & in le fine faire une entire agard de tout : Et ceo eſt bone, 47.Edw.3.21.a. 39.Hen.6.12.a. Danby. Temps.

Si Arbitratours agard un choſe de une parte, & devant q̄ ils poient agree de lour agard del remnant, le temps done per le ſubmiſſion expire; tout lour agard eſt voide,39.Hen.6.12.a.Priſot. Temps.

But

But if there be by the ſubmiſſion no order taken for the Delivery or Publication of the Award;

Then

Notice. *In honeſty & Conſcience le Arbitratour eſt tenus de faire notice al parties de ceo. vide 8. Edw. 4. 10. a. Billinge, vide 8. Edw. 4. 2. a. b. Markham.*

Notice. *Mes in rigore Iuris l'arbitrement meſme eſt intend choſe Notorious, 8. Ed. 4. 1. b. Chock. 8. Edw. 4. 21. b. Chock.*

Et pur ceo.

Notice. *Parties al Arbitrement ſont tenus de prender notice del agard a lour peril, 8. Edw. 4. 18. 21. 18. Edw. 4. 18. a. 1. Hen. 7. 5. a.*

Notice. *Coment que les Parties ne ſont daver Notice done a eux de L'arbitrement, uncore ſi les Arbitratours agard que un des parties fera act que depend ſur auter primes deſtre fait del auter partie, de ceo il aver notice, 8. Edw. 4. 21. b. 20. Edw. 4. 8. b. Sulliard.*

Hitherto hath beene ſaid of ſuch matters where the Arbitrators have executed their Authoritie without controll of the parties: But if, before any Award made, their Authority ſhall be lawfully countermanded; Then doth there remaine in this place to be conſidered,

1, Whether ſuch Countermands be permitted by the Law.

2, And in what Caſes not.

3, And alſo in what manner the ſame is to be done.

Wherefore

Countermãd. *Si le ſubmiſſion ſoit ſans fait, cheſcun des parties poit Countermand & diſcharge les Arbitratours,*

49. Edw.

49. Ed. 3. vide Fitzherbert Arbitrement 22. 21. Hen.6. 30.a. 28.Hen.6.6.b.5.Edw.4.3.b.8.Edw.4. 10.b.

Mes donq̃ les parties doient doner Notice al Arbitratours del dit discharge, 8.Edw.4.10.b. Markham, 8.Edw.4.12.a.Lakyn. Countermãd.

Mes si divers d'un part & diverse d'auter part eux submit al Arbitrement sans fait, un del une parte ne poet discharge le Arbitratour sans les auters son Compagnons de mesme le partie, 28.Hen.6.b. Countermãd.

Mes si le submission soit per fait un des parties ne poit Countremaund les Arbitratours, 49. Edw. 3. Fitzh. Arbitrement 22. ment in le liver a large. 5. Edw.4.3.b.8.Ed.4. 11.b.Pigott. Countermãd.

The last cause of the foure before remembred being the Finall Cause (that is) the end and scope wherefore men doe submit themselves unto the Arbitrement and Award of any person, consisteth upon two things. *Regula à sanssa finali.*

1 *Chacun Arbitrement est a faire final determination & de appeaser le strifes, debates & variances enter les parties. 19.Hen.6.37.b.Newton, 8.Edw.4.10. a. Lakyn. 8.Edw.4.12.b.Telverton.* *Final determination.*

2 *Chacun Arbitrement est a reducer chose incertaine a une certainty, & nemy a reducer un certainty in auter certainty, 6.Hen.4.6.a. Hankford. 4.Hen.6.17. b.Weston. 10.Hen.7.4.a.* *A reducer incertaintie al certaintie.*

Thus much hath beene sayd as touching the Causes.

Now as concerning the Genus or Generall Notion: In the former definition of an Arbitrement, It is to be considered, That

Iudgement. *Chescun Arbitrement est un Iudgement*, 8.*Ed.*4.1. *b. Fairefax.* 8.*Edw.*4.10.*a. Ieney.* 21.*Ed.*4. 39.*a. Vavasour.*

Because the speciall difference used in the sayd former definition of an Award, was this, That it was given by Iudges elected by the parties, and not by compulsary Iurisdiction of the Court, thereof ensueth, That

Intent del Arbitrator. *Il est diversitie ou home est Iudge per authoritie del ley, & per Election del partie mesme : Car Iudge de Record ne doner Iudgement vers les parties, si non q. ils sont appells devant eux per processe del ley : Mes autrement est dun Arbitratour q. est Iudge per enter les parties*, 8.*Ed.*4.2.*a. Illingsworth.*

Of this also ensueth, that whereas every Iudgement of Record shall be executed literally, according to the warrant issuing out of the Record, upon and for the executing of the said Iudgment; Yet nevertheless.

Intent. *Chescun Arbitrement doit este expound et intend accordant al intent des Arbitratours, & nemy Literalment.* 17.*Edw.*4.3.*Brian.* 21.*Edw.*4.39.*a.b. vide* 19.*Hen.*6.36.*b. Markham.*

Intent, *Mes si l'intent des Arbitratours ne estoit ove la ley: donq. les parties ceo performera accordant eux parolls in tiel sence que agree ove le ley.* 21.*Edw.*4.39.*b. Fairefax.*

The Causes of an Arbitrement being thus deciphered there followeth next the consideration of the effects thereof.

The Effects of an Arbitrement are these which doe ensue.

Per

Per Arbitrement le Controverſie tranſit in rem Iudicatam. 49.*Edw.*3.3.*a. Hanmer.* 20.*Hen.*6.41.*a. Paſton.* 9.*Edw.*4.51.*a. Danby.* 6.*Hen.*11.*b. Huſſey. Com. Fogoſſa,* 6.*a.* *Tranſition in rem judicatã.*

Et pur ceo

Lou le party port action pur le tort a luy fait, eſt bone Plea que il eux ſubmit al Arbitrement de tiels; qui agard que il pajera tant &c, mes le jour de payment de ceo neſt uncore venu, 6.*Hen.*7.11.*b. Huſſey.* 9.*Edw.*4.51.*a. Chock.* 20.*Hen.*6.12.*b. Newton.* 20. *Hen.*6.40.*a.b. Paſton.* 28.*Hen.*6.12. 5.*Ed.*4.7.*a.* *lour de nient venus. pur pay le mony.*

Mes ſi le jour de payment ſoit paſſe, il doit monſtre que il tender les deniers al jour, & que il eſt uncore priſt. 8.*Hen.*6.25.*b. Martin.* 16.*Edw.*4.8.*b. Pigot.* *lour de payment.* *Vncore priſt.*

Car,

Arbitrement per que les Arbitratours agard, que un des parties pajera money, done action. 5.*Edw.* 4. 7.*a. Chock.* 16.*Edw.*4.9.*a. Pigot.* 17.*Edw.*4.2.*b. Townſend.* 17.*Edw.*4. 8.*a. Pigot. Fitzh. Natura brevium* 121.*g.* 6.*Hen.* 7.11.*b. Huſſey.* 9.*E.*4.51. *Danby.* *Done action.*

Et ſi les parties ne performe L'arbitrement, le parte eſt reſtore a ſon primer action, 49.*Ed.*3.3.*a.* *Reſtore al primer actiõ.*

Mes uncore eſt a ſon Electon de aver Briefe de debt ſur le agard, ou le primer Action, 49.*Ed.*3.3.*a.* 33. *Hen.*6.2.*b.* *Reſtore al primer actiõ.*

Mes ſi le payment ſoit fait, le primer tort eſt tout oſterment determine per le agard, 4.*Hen.*6.1.*a.* 8.*Hen.* 6.25.*b.* 21.*Hen.*7.28.*b.* *Determine.*

Ex que enſuit auxy.

Si les Arbitratours agardant, que un des parties pajera tant des deniers, Et cheſcun de eux eſt oblige al *Double Action.*

auter pur eſtoier al agard le party avera action ſur le agard, & auxy ſur le fait ſi agard ne ſoit performe. 21.E.4.41.b. 33.Hen.6.2.b.

Collaterall matter. Si le ſubmiſſion ſoit par paroll, & Arbitrement ſoit que un des parties fairont un collateral act, auter q. payment des deniers, ceo ne done action, & ſi ne ſoit execute in fait et ſatisfie, le Arbitrement nad aſcun effect; Et tel Arbitrement ne determine le primer tort, 19.Hen. 6.38.a.Newton. 20.Hen.6.19.a.Markham. 5.Edw. 4.7.a.Chock. Com.Fogoſſ. 11.b.

Collaterall matter. Vncore ſi le ſubmiſſion ſoit per obligation, ſi un Collaterall act ſoit agard deſte fait; ſi ceo ne ſoit performe, le obligation ſera forfeit, 9.Ed.4.44.a.

Thus much touching the effects of an Award.

A Conſequent thereof is, the Performance; wherein we are to conſider, That

Performance. Les parties doient faire tout ceo que in eux eſt a ceo performe, 21.Ed.4.39.b.Fairefax.

Aſſiſtance. Si per le Arbitrement ſoit agard que un act ſera fait le quel home poit performer, in deux manners lun voy per luy meſme, et per l'auter voy il doit aver l'aide d'un auter perſon: le party doit ceo performer per tel meane, que il ſolement poit faire ſans aid de l'auter, 21.Ed.4.40.b.Huſſey.

Parte. Arbitrement ne doit eſte fait in part, et in part ne my, 6.Hen.7.10.b.

Parte. Mes coment que Arbitrement ne poet eſte fait per les Arbitratours, part a une temps, et part a auter temps: uncore ceo poit eſte performe part a un temps et parte al auter, 8.Ed.4.10.b.Fairefax.

Tempi. Les parties averant reaſonable temps a eux allowe pur le performer d'un agard, ſo nul temps ſoit limitt,

20.Edw.4.8.b. 21.Ed.4.41.a.b.&c.

Si le act que les Arbitratours agard que l'un party performera, ne poit eſte performe devant auter act primes fait per l'auter partie, ſi ceſt partie ne fait le primer act, l'auter eſt excuſe, 5.Edw.4.7.a. *Primer Act.*

Arbitrement que l'un partie pajera mony, & l'auter fera Releas; ceo ſera fait a un meſme temps, ſi ne ſoit obligation de performer le Agard. 21. H. 7. 28.b. Knightly, & Reede. *Tout a un temps.*

Mes ſi ſoit Obligation a performer le agard, donq; chacun doit performe ſon parte de ſoubs le peril de L'Obligation, 21.Hen.7.28.b.Reede. *Chacun performe ſon parte.*

Si Obligation ſoit fait pur eſtoier al Arbitrement coment q; le Arbitrement ſoit void in Ley, uncore ceo doit eſte performe, autrement le Obligation ſera forfeit 22.Hen.6.46.b.Port, per Cur. *Voide award Quere.*

Mes ſi action ſoit port ſur tel void Agard, le Action ne ſera maintaine, 22.Hen.6.46.b.Port. *Void agard.*

Si le matter contenus in le agard, & le matter contenus in le ſubmiſſion de que les Arbitratours doient agarder, differt in parolls, ou in circumſtance, les parties al Arbitrement ne ſeront receive in ſute ſur ceo de avererrer que tout eſt une, 7.8.Eliz.242.b.52. *Averment.*

Thus much hath been ſpoken concerning Arbitrements, their Cauſes, Effects, and Conſequents.

There reſteth to accompliſh our intended methode, that wee adde ſomewhat touching that wherewith an Arbitrement is compared, matched and reſembled in the Booke Caſes.

Wherefore know you that,

Chacun Accord reſemble un Arbitrement. *Paria.*

Vncore chacun Accord doit eſte ſatisfie ou Recompence; *Differentia.*

pence; et Accord ne done Action; lou del auter parte Arbitrement pur que les parties ſont adjudge de paier deniers, done action; & ne beſoigne deſte plede, execute come devant ad apparus, 6. Hen. 7. 11. b. 5. Ed. 4. 7. a. 17. Ed. 4. 2. b. 17. Ed. 4. 8. a. Com. 6. a. Fogoſſa.

And thus farre forth for example ſake, have we ſet out theſe Grounds & Rules of Arbitrements: Whereunto if there were added, in their due places, the reſidue of the Rules & grounds which may bee collected out of the bookes of the Law concerning the ſame, and furniſhing both theſe and them with as many Caſes as might be applyed thereunto; the ſame Caſes being put at large under every of their Rules, to demonſtrate that in particular, which the Rule includeth in generall, the enterpriſe would prove (as I think) ſome ſhew of a Treatiſe, concerning this Title.

Which being no hard thing to accompliſh, thereby would appeare that it were neither unpoſſible neither unprofitable, nor altogether unpleaſant, to reduce every title of the Law particularly to a Methode; and ſo conſequently, the whole body thereof into a perfect ſhape, which now ſeemeth wholly without Conformitie, and altogether diſmembred.

Wherefore now, as touching the Materiall Cauſe of Rules and Grounds, thus much ſaid, may ſuffice.

Formall

Formall Cauſes and Grounds of the Law.

THe diviſions of grounds of the law, as touching and concerning the forme, are in two ſorts to be conſidered. 1, Firſt, the Coherence of the words and the Matter. 2, Secondly, the manner of the Manifeſtation thereof.

For the Coherence of the matter and words, there are to be regarded theſe two qualities:

1. Firſt, Verity, and
2. Secondly, Amplitude or Generality.

Verity of Propoſitions or Grounds conſiſteth of two ſorts: For they import either a neceſſary or knowne truth which cannot be impugned: Or Contingent Veritie or Probability, which may ſometimes notwithſtanding their ſhew of truth, be impeached of falſhood, and ſo be ſubject unto many exceptions.

The former of theſe are called Primarie Concluſions of Reaſon. And the latter Secondarie Principles.

1, Thoſe of the firſt ſort are ſuch generall aſſertions of the Law, as are imprinted in the mind of every Man, and diſcerned by the light of very Nature it ſelfe: which, as moſt certaine and undoubted, need no confirmation or fortification, bnt of themſelves are moſt ſufficiently known to be true and not impugnable: which the Philoſophers doe call, *Primæ & per ſe cognitæ*; *Communes animi Conceptiones & Notitiæ*, familiar to the conceit of every perſon.

Notes

Notes Collected touching the Veritie of Principles.

Arist. lib. 1. Dem. cap. 25 T. 43. PRincipiorum, Alia sunt necessaria, Alia in rebus contingentibus cernuntur. Axioma verum, est, quando pronunciat vt Res est.

Peter Ramus li. 2. dial. c. 3. Axioma verum est, aut { Contingens. / Necessitans.

Peter Ramus ibidem. Arist. Top. lib. 1. cap. 1. Necessarium Axioma, quando semper verum est; nec falsum esse potest. Vnde Aristoteles, Vera quidem sunt & perspicua ea, quæ non ab alijs sed à seipsis fidem habent.

De primis Principijs.

PRincipia nihil aliud sunt quam Propositiones immediatæ.

Arist. lib. 1. dem. cap. 8. T. 24. Ego propria cujusq; generis Principia appello, quæ, quod sint, Demonstratione probari non possunt: (Nam, quæ sit verborum vis & significatio, tum Principiorum, tum eorum quæ ex Principijs efficiuntur, intelligendum est) Quod verò ipsa sint Principia, citra demonstrationem ponitur; Reliqua autem Demonstratione concluduntur.

Arist lib. 1. dem. c. 2. T. 5 Prima et principia pro eodem sumo. Est autem Principium demonstrationis Propositio, quæ ob id immediata dicitur, quoniam nulla est alia prior per quam ipsa confirmari possit.

Primaria

Primaria principia dicuntur universalia quædam Iuris pronunciata, quæ omnibus hominibus ita sunt impressa naturaliter & infixa, ut, velut indubitata & notissima, non alia egeant Demonstratione, aut certè levi aliqua probatione Confirmentur. *Io. Coras. de Arte juris. lib. cap. 24.*

Vnde et Communes animi Conceptiones et Notitiæ appellantur quod suapte vi & perspicua sit & evidens horum Principiorum veritas & Natura, quasi sine aliqua Dubitatione & Contradictione veluti ab omnibus Concessa, in disputatione sumantur. *Ibidem.*

Of which sort for Example are some of them before mentioned, and here againe to be remembred in this behalfe, in manner following.

Volenti non fit injuria.

Omne majus continet in se minus.

Qui sentit Commodum sentire debet & onus.

Fraus & dolus uemini patrocinantur.

With infinite other in universall manner proposed, and with not a few in speciall set forth; As in Grants, as afore hath beene declared.

Quando aliquis quid concedit, & id etiam concedit sine quo res concessa esse non potest.

In Testaments.

Testamentum est morte confirmatum. *Com. Grister. 280. b.*

In Rents.

Chacun Rent est issuant hors de terre.

With exceeding many other of like nature to be found in every title or tractate of the Law. The manifest truth and great Reason of which said Grounds is evident to every person of any iudgement, and need no proofe for demonstration and establishing of them.

2 Secondary Principles, are certaine Axiomes, Rules, and Grounds of the Law, which are not so well knowne by the light of Nature, as by other meanes: and which although they need no great proofe to be confirmed; because they comprehend great probabilitie; yet many times are they, at the first shew, not yeelded unto without due consideration: and are peculiarly knowne, for the most part, to such onely as professe the study and speculation of Lawes.

Probabilia sunt quæ probant, aut omnibus, aut plurimis, aut certe sapientibus atque iis vel omnibus vel plurimis vel iis quorum spectata est & perspecta sapientia. Arist. Top. lib. 2. c. 1.

Probable they are said to be, because, although the manifest truth of them be unknown, yet nevertheless they appeare to many, and especially to wise men, to be true.

And of this sort in the Lawes of the Realme there are so many found, that some men have affirmed, that all the Law of the Realme is the Law of Reason: because they are derived out of the generall Customes, and Maximes, or Principles of the Law of Nature or Primary conclusions.

And for the knowledge of these Propositions there is a greater difficulty; and therefore therein dependeth much the manner and forme of Arguments in the Lawes of *England*.

Doctor and Student *l.* 1. *c.* 5. *f.* 10. *a.*

Notes

Notes collected touching the difference betweene Primarie and Secondarie Prinples.

PRincipia immediata quæ in demonſtrationibus accipiuntur, in duo genera diſtribui poſſunt. *Ariſt. l. 1. c. 2 T. 5.*

Vnum eorum quæ quanquam demonſtrari non poſſunt, non tamen ita aperta, & per ſe manifeſta ſunt, ut neceſſe ſit ante cognita eſſe ei qui artem aliquam diſcere velit, quas nos Poſitiones appellamus.

Altero genere continentur ea, quæ ita ſunt per ſe perſpicua, ut non poſſint non eſſe, omnibus multò ante cognita, & perſpecta quam quicquam doceatur; quæ Pronunciata dicuntur.

To like effect ſpeaketh *Ariſtotle* in another place, *Ea pro initio & propoſito ſumenda ſunt.*

1 *Quæ in omnibus.*

2 *Vel certe in plurimis rebus ineſſe videntur.*

The former ſort *Ariſtotle* ſeemeth to call, as afore ſhewed, *Pronunciata*, the other *Propoſitiones.*

And although in the Law of the Realme, they are indifferently called, without diſtinction, Rules, Principles, Grounds, Maximes, Eruditions, and ſuch like: yet the judgement of *Maſſæus* herein is worthy obſervation.

Accurſius videtur non parum aberraviſſe à vero, cùm idem ſignificare voluerit Principia, Maximas, & Regulas; cùm (Ariſtotele auctore) icuiuſque ſcientiæ principia ſunt quædam propria, quæ quod vera ſint non contingit demonſtrari, & quæ per ſe, & *Ant. Maſſæus l. 1. de exercitio Iuris peritorum.*

non per alia fidem habent, quoniam nihil prius superiusque in ea scientia est per quod confirmari explicarique possint.

Talium autem Principiorum, nonnulla sunt positiones, alia dignitates, sic dicta, ob id quod jure illis fides habenda sit, cùm ea unusquisque audita statim admittit: quale est istud: Totum unumquodlibet majus est aliqua sua parte. Ha rursus appellantur Maximæ, Propositiones, & Communes animi conceptiones; quod multorum scilicet intellectu facile percipiantur. Tales autem non sunt Regulæ; quæ licet sint universalia Præcepta, indigent tamen probatione, & probari possunt: Nec tamen audita admittuntur.

He seemeth to attribute the name of Principles, Axiomes, and Maximes to the first sort, and the name of Rules to the second.

Of the secondary Principles or Rules there are two kindes. Some deduced and drawne from the usuall and ordinary disposition of things (as hath been before declared) and by the observatiõ of humane nature dispersed in the minds of men, collected by long observation: Whereof some are altogether upheld in the Law upon common presumption, and intendment: Others doe rest upon discourse of Reason deducted in Argument. But of the former, some are such, as although they are but probable, and import no certaine truth, and therefore may notwithstanding bee sometimes untrue: yet nevertheless for the great likelihood of them in humane actions, and the better to frame a conformitie, through the whole

body

body of the Law, the ſaid Lawes permit no allegation to impugne them, or any ſpeech or averment to impeach their credit.

The firſt ſort of Secondary Rules grounded upon entendment.

OThers there are alſo that depend upon entendment: But of the former kinde, this is one, grounded upon naturall affection.

La ley ne voit preſume que aſcun voit lede ſon heire, ou auter que eſt prochein de ſon ſanck, mes que il voit plus toſt advance luy. Com. Sharington & Pledal.

Which Ground, upon the preſumption of naturall affection, is not ſuch, as that it ſoundeth alwaies true; (for in divers perſons nature worketh diverſly) Wherefore although this aſſertion ſhew how every man ſhould be affected, notwithſtanding it is no proofe that all men are ſo affected. And yet nevertheleſſe this ſtrong entendment of Law, doth not permit any thing to impeach the ſame; and will not ſuffer any perſon bound by collaterall warranty (the reaſon whereof floweth herehence) to traverſe ſuch affection, although there be never ſo pregnant proofe to encounter the ſame.

Notes touching the Definition, Division, and necessary Consequents of Secondarie Principles.

Johannes Corasius de juris arte cap. 26. lib. 1.

IVris Præcepta secundaria sunt certa quædam Axiomata & Definitiones seu Regulæ, quæ non tam naturâ quàm civili aliquâ ratione & authoritate, aut communi mortalium usu per hominum animos diffunduntur.

Quæ etsi plerumq́, vera sunt, nec valdè egeant demonstratione; non tamen ita, priusquam prælius considerentur ab illis cognoscuntur qui nostra scientia dant operam. Quapropter, levi aliqua & verisimili ratione, ut ijs assentiantur, opus est.

Doctor and Student *l. 1. c. 5. fol. 10.*

See the manner and meanes how they are inferred by discourse out of the generall Customes or Principles of Reason, and the example thereof used by the Author of the Dialogues of the Doctor and Student.

Presumption or Entendment of Law, whereupon certaine of the secondary Rules are grounded (as before is shewed) are in two sorts: for *species præsumptionum sunt duæ: una, quæ legitimis probationibus regulariter refutari potest, quam communem licebit appellare: altera, quæ reprobari non potest, quæ & specialis rectè fortasse dicetur. Certè magno Reip. bono constituuntur hujusmodi præsumptiones: nec potest fieri ut sine præsumptionibus ulla certa jura, aut ullæ certæ leges describantur.*

Joach. Hopp. de juris arte lib. 2. fo. 466.

Ibidem.

Secondary Principles are grounded either upon Entend-

Entendment of Law, of which sort some are such as doe admit of no proofe to encounter them, and rest upon Entendment, but yet admit proofe to the contrary. Or discourse of reason.

So likewise the Law upon like common presumption conceived of the acts and behaviour of men, intendeth this Principle.

Nul home sans cause voile faire act a prejudice soy mesme. Com. Manx. el. 6. a.

And hereupon the Law presumeth that every assertion and allegation proceeding from any person which soundeth to his prejudice and hurt, is so undoubtedly true, as that there shall not be suffered any travers or deniall of the same. Wherefore if in a *Præcipe quod reddat* brought of twenty acres of Land against one, and he, before the Statute of *Conjunctim feoffatis*, had pleaded Ioyntenancy with another of deed; or sithence the said Statute, if he had pleaded Ioyntenancy by Fine with another; although the Plea be utterly false, yet shall not the demaundant have any answer or travers thereunto; because that when the demandant by his Writ hath admitted him Tenant of the whole; and hee saith that he was Ioyntenant with another; this other, if he be false, may stop the Tenant by this Record; To say the contrary of his affirmation, and thereby may gaine the Moity of the land, against him that hath so pleaded: And therefore, for that, that men are not wont to tel untruths in disadvantage of themselves; and that the saying hereof if it were not true, will greatly be to the prejudice and hurt of him that affirmed

affirmed it; thereupon the Law presumeth, that it was true indeed; and will in no wise admit the travers against the same; or give the demaundant ability to impugne it; but hereupon presently, the Writ shall abate, and no maintenance of the writ for the cause aforesaid, shall be allowed.

In like manner also unto matters of Record the entendment of law doth give an impeachable credit; And hereof also this rule of Law is drawne.

Com. Ludford. 491. b. *Matters de Record import in eux (per presumption del ley, pur lenr hautnesse) credit.*

And therefore none shall bee permitted to say that the Kings Patent under the great Seale was made or delivered at any other time then that wherein it beareth date; No more then a man may say, That a Recognizance or Statute Marchant or Staple, was acknowledged, or any Writ was purchased at any other time, then that wherein it beareth Date. For an averment that it was antedated, or that it was delivered or acknowledged after the date, is an averment tending to the discredit of the great Seale, or of the Iustice or Officer of Record which recorded the Recognizance, or the Statute Marchant, or such like.

Lambers Iustice of Peace lib. 1. cap. 13. In the dealings and affaires of Men, one Man may affirme a thing which another may deny. But if a Record once say the word, no man shall be received to aver; speake against it; or impugne the same. No though such Record containe manifest and knowne falshood, tending to the mischiefe and overthrow of any person.

38. Ass. 21. And therefore whereas certaine persons were Out-

Outlawed in the Kings bench, in the time of *Shard* Iuſtice, and their goods forfeit, and their names likewiſe certified into the Exchequer with an abſtract of their goods, It hapned ſo that the name of one (by miſpriſion of the Clerke) was, among the reſt certified likewiſe into the Exchequer, as outlawed, and that hee had goods to the value of ſixe pounds, whereas indeede the ſame man was not outlawed. And thereupon a writ iſſued to the Sheriffe of that County, where the ſaid goods were ſuppoſed to be, to ſeize the ſame to the uſe of the King, who returned that a Nobleman had ſeized the ſame goods; And thereupon iſſued forth another Writ out of the Exchequer, to cauſe him to anſwer the ſame goods ſo ſeized by him, who upon the Returne of the ſecond Writ, alleaged, that the partie whoſe goods he had ſeized, was not outlawed: And *Greene*, one of the Iuſtices of the Kings bench came into the Exchequer with the perſon who was ſuppoſed out-lawed, and there teſtified that hee was not outlawed; but ſhewed, that that which was certified, was done altogether by the miſpriſion of the Clerke: Where *Skipwith* returned him this anſwer; That although all the Iuſtices would now record the contrary, that they could not be permitted, nor any credit might be given therunto, when as there was a Record extant, and not Reverſed, teſtifying the ſame Out-lawry: yea, the Law ſo mightily upholdeth the intended Credit of a Record, that it preferreth the ſame before the oathes of men, ſounding to the contrary, and in reſpect thereof,

will not permit a verdit to bee received, which might impeach the ſame.

9. Hen. 6. 56. b And therefore whereas one brought a Writ of waſte, and aſſigned the waſt in divers particular things, & moreover in a Meſſuage & Tenemẽts in Wood-Church; where among other waſts aſſigned, the Plaintife ſhewed, that the Defendant had done and permitted waſte in the Hall of the ſayd Meſſuage, &c. The Defendant pleaded in this Action, that Woodchurch was a Hamlet of A. and no Towne of it ſelfe. Which plea includeth a Confeſſion of the waſte to have beene done in ſuch manner as was declared. And upon this plea, the parties were at iſſue; with the which the Iurie were charged: And further it was given them in charge, that if they found that Woodchurch was a Towne of it ſelfe, and no Hamlet of A: as the Plantife had ſuppoſed, that then they ſhould aſſigne damages ſeverally for every waſte committed. The Iurie at length found, that Woodchurch was a Hamlet of it ſelfe, and aſſeſſed damages for certaine of the particular waſtes ſuppoſed ſeverally, as they ought. And as touching the waſt ſuppoſed to be done in the ſaid Hall, they ſaid there was no ſuch Meſſuage. The Iudges rejected their verdit, becauſe it was contrary to that which was implyed by the Plea of the Defendant of Record: and ſo inforced the Iury to give damages for a waſt: which (indeed) was not done contrary to the Conſcience of the Iurie; notwithſtanding that ſome of them made proteſtation, that in ſo doing they might bee perjured:

Which

Which wholly was done onely to uphold the credit of the Record; and that the verdit (of Record) might not be contrary to that which was imployed by the Plea of the parties.

Moreover, there is a Rule of Law wholly grounded upon Entendment, which is this;

Livery del fait ſera intend in le lieu ou le date fuit.

The delivery of a Deede ſhall bee intended to be where it beareth date.

Which Rule the Law upholdeth for certaine truth, (although in very deed it may bee at ſometimes untrue) And therefore will not permit any proofe which may impeach the intended truth of the ſaid propoſition. For confirmation whereof, a notable caſe cited in the 31. *Hen.* 6. and by way of Argument alleadged in *Fogaſſa* his Caſe, may be produced; which was in this manner. An Action of Debt was brought upon a Deed; The Defendant denyed the ſame; whereupon the parties were at iſſue; and the witneſſes produced to prove the Deed were examined, where the Deed was delivered: who anſwered: At *Yorke*; which was in another County then where the ſaid Deede bare Date; And hereupon the Defendant demurred: And after upon conſideration, Iudgement was given againſt the Plaintife in overthrow of the Action founded upon that Deed; which cannot be intended to be delivered elſe where then at the place where it beareth Date. 31. *H.* 6. *Cō.* *Fogaſſa.* 7. *b.*

Many Examples may bee further produced to like effect, to prove that divers Rules there are received

ceived in the Law which upon presumption and common Entendment, to eschew some notable mischiefe or inconvenience, are so holden for Truth, that in no wise they shall bee incountred; although indeed, as occasion may fall out, they do containe manifest and apparent falshood. But these already in that respect alleadged may abundantly suffice for example.

The second sort of Secondary rules grounded upon entendment

Of like nature also there are in the Law other kind of Rules or principles; which although, they doe concerne contingent matters; and therefore may sometimes be impeached, and found untrue; Yet doe they cary a kind of Credit also upon presumption or Entendment of Law, although not so vehement as the former.

Wherefore although the Law doth receive them *Prima facie*, and at the first shew, as likely, and giveth credit unto the Affertion contained in them, yet nevertheless doth it admit proofe to the contrary, and so suffereth such presumption or Entendment, which upholdeth such Rules, to bee impeached, and controlled by a contrarie tryall by pregnant proofe, and so doth permit any averment to be made against the same. For Example:

20.H.7.11.b Coningsby. It is a Rule in Law that a Verdict *sera intenda touts foits vray tang. il est revers pur ceo q. il est issint trove per serement de 12 homes.*

A verdict shall be intended alwaies true, till it be reversed, for that it is so found by the oath of twelve men.

5.H.7.22.b. And hereupon it is agreed for Law, That if a Iudgment be given erroniously, the party grieved thereby

thereby ſhall not onely have his writ of Error to redreſſe the ſame, but alſo a *ſuperſedeas*, to Countermand execution thereupon. But if Iudgement be given upon a verdict, although the ſame verdict be untrue, and the partie grieved doe bring his writ of Attaint; Yet neverthelesſe he ſhall not in that caſe have a *ſuperſedeas* to ſtay execution, for the intended truth, which the Law ſuppoſeth in the ſaid verdict. And yet the Law permitteth the falſhood in verdicts to be laid open, & puniſheth them with great ſeveritie, 33. *Hen.* 8. 196. *Brookes caſe*, 4. *Ed.* 6. *Com.* 49.

If a Writ of *Conſpiracie* be brought againſt one for that hee gave evidence before the Iuſtice of Peace at their Seſſions, concerning the ſuſpition of a Felony ſuppoſed to bee done by the Plaintife, upon which Evidence the Plaintife was indicted of the ſaid Felonie; and after found Not guilty by a Iury of twelve Men; It is no plea in this writ of *Conſpiracie* for the Defendant to ſay, that the Plaintife was guilty of the Felony, for that were to encounter the verdict; which ſhal be entended true. 20. *H.* 7. 11. *b. Coninsby.*

And although the Law doe give Credit to all verdicts, yet doth it not foreclose the partie grieved thereby, but permitteth him to impugne it, and to impeach it of falſhood, if he can, by his writ of Attaint. *Com. Wrotſley.* 193. *b.*

Alſo there is a Rule in the Law, That

Feeſimple ou auter eſtate certaine convay a un ſera intend de continuer in le perſon in q̄, il eſt repoſe, touts foits durant meſme l'eſtate.

An eſtate of inheritance or other eſtate certaine conveyed to a man, ſhal be intended to continue in the perſon wherin it was repoſed alwaies during the continuance of the ſaid eſtate.

Although this for Law be *Prima facie* intended true; yet nevertheleſſe thereunto this muſt be added, *viz.*

Si ne ſoit monſtre coment autrement ceo eſt diviſt.

If it be not ſhewed otherwiſe how it is diviſed.

By thus much ſaid, it is ſufficiently made manifeſt, that ſome propoſitions, Rules and Grounds of the Law are intended true; but yet proofe is allowed to encounter the ſame.

So hitherto hath beene ſpoken of the *Verity* of *Propoſitions*; whereof ſome are indeed and nature manifeſt true, and grounded on neceſſary reaſon; and other ſome are true alſo, but upon matter contingent.

Contingent verity, was ſaid to be of two kindes. The one grounded on common Preſumption and entendment of the Lawes, which likewiſe was ſubdivided into two branches. Some of them ſuch as doe not admit any Contradiction to impugne them; For the certaine ſuppoſed truth (though indeed not alwaies found in them, yet alwaies deemed by them) alloweth no controll; The other ſort of Rules reſting upon Entendment, are ſuch as are *Prima facie* ſuppoſed true, but yet no otherwiſe ſuppoſed true then till the contrary be proved, and they impeached of falſehood: Of both which there hath beene ſhewed ſufficient examples.

Now

Now therefore in order followeth the second principall part of *Contingent Propoſitions* or *grounds* framed upon obſervation of Nature, and diſpoſition of things, collected and drawne by diſcourſe of Reaſon, becauſe it cannot be equally evident to every Mans capacity. And for as much as the ſaid diſcourſe and manner of reaſoning, through the weakneſſe of mans underſtanding, and difficultie of the matter, may faile and be oftentimes deceived in ſome circumſtances which may and daily doe occurre through the variety of particular matter, which againe (in Reaſon) may offer a contrary reſolution. Therefore are thoſe *Grounds* not univerſally true, but ſubject to many and manifold exceptions: And yet nevertheleſſe true in all ſuch Caſes as are not comprehended under thoſe *Reſtraints* or *Exceptions*. Of which kinde we mentioned ſome in the beginning; as namely;

The ſecond principall kind of contingent Propoſitions.

1, *Sublata Cauſa tollitur Effectus.*

2, *Qui tacet conſentire videtur.*

3, *Quod initio non valet, tractu temporis non convaleſcit.*

4, *Quando duo Jura in uno concurrunt, æquum eſt ac ſi eſſet in diverſis.*

Every of w^ch^ with many other of the like nature, though they be of themſelves, upon the firſt view of great *Probability*; yet nevertheleſſe, being with more earneſt conſideration pondered, are found not ſo firme as they ſeem, but are ſubject to ſome controulment, and to be impeached with ſundry inſtances and exceptions. Of ſuch like the number is in manner infinite: at the leaſt many thouſands

in

in our Law, which are publiſhed in the *French*.

12. H. 8. 2. b. Eliot. *Neſt Loial pur aſcun de enter in le terre del auter ſans ſon licence.*

It is not lawful to enter in another mans ground without Licenſe.

Diſcent de Eſtate d'inheritance in terr, toll le entry de ceſty q. droit ad.

The diſcent of an eſtate of inheritance in lands taketh away his entry which hath right.

But theſe few ſhall ſuffiice in this place for an example.

Wherefore for as much as the minde of man is beautified with two faculties or powers in quality different, though flowing from that which is in nature indiviſible; whereof the one we now call for diſtinction ſake (*Capacitie*) and the other (*Diſcourſe*.

By the former of which we apprehend, as with the inward eye, the naturall light and reſplendencie of many *Primary Propoſitions*, and knowne Notions; whoſe clearneſſe and evidence cauſeth every one to yeeld thereto their conſent.

And by the later we doe Collect, Reaſon, Argue, and inferre of thoſe former Notions and Reſolutions, certaine *Secondarie Propoſitions*, deſcended and derived from the firſt, as branches from the Roote, or Rivers from the Fountaine; which by how much the more they are drawne from their ſpring, by ſo much the more (by reaſon of the variety of interpoſed circumſtances) they are oftentimes obſcured and made leſſe cleare and evident.

And

And ſith that every Science is not of like certainty, by reaſon of the variable condition of the ſubject whereupon it is imployed; ſo that rightly of Morall Philoſophy (conſiſting wholy of mans changeable and inconſtant converſation, and frō whence indeed, the knowledge of all Lawes are in a generality derived, and therto to bee referred) ſaid the Philoſopher *Ariſtotle* right well, in excuſe of his purpoſed Method in the delivery of the ſame, That *Doctrina diſcernens honeſta & turpia, tantis dubitationum fluctibus concutitur, ut multis lege tantum & opinione, non naturâ, conſtitutum eſſe jus videatur.* It followeth me thinketh, of neceſſitie, that it is ſcarcely poſſible to make any ſecondary Rule of Law, but that it ſhall faile in ſome particular caſe: whence ſpringeth this often uſed aſſertion, *Non eſt Regula quin fallat:* And therefore the Ordainers and Interpreters of Law, reſpect rather thoſe things which may often happen; and not every particular circumſtance, for the which though they would, they ſhould not be able by any poſitive Law to make proviſion.

Ethica vera ſupponitur quaſi moralis ſcientia, quia tractat de moribus. Bracton l. 1. c. 2. 4. b. Ariſt. Ethic. l. 1. c. 3.

By reaſon whereof they doe permit the Rules, Axiomes, and Propoſitions of the common Law, upon diſcourſe & diſputation of reaſon, to be reſtrained by exceptions; which are grounded upon two cauſes. The one is Equity: the other is ſome other Rule or Ground of Law, which ſeemeth to encounter the Ground or Rule propoſed: wherein, for conformities ſake, and that no abſurdity or contradiction be permitted, certaine exceptions are framed, which doe not onely knit and con-

joyne one Rule in reason to another, but by meanes of their equity, temper the rigour of the Law, which upon some certaine circumstances in every of the said Rules might happen and fall out: *Et omnia benè coæquiparat*, as saith *Bracton*.

Bract. l. 1. c. 5

And therefore the Author of the Dialogues betweene the Doctor and Student, describeth equity according to this the effect thereof here mentioned: which is, that it is no other thing, but an exception of the Law of God, or of Reason from the generall rules of the Law of man, when they by reason of their generality, would in any particular case, judge against the Law of God, or the Law of Reason: The which exception is secretly understood in every generall Rule of every positive Law. And a little after, in the same place affirmeth, That equity followeth the Law in all particular cases, where right and justice requireth, notwithstanding that the generall Rule of the Law be to the contrary.

Lib. 1. ca. 16.

And the exception so framed upon any Rule or Ground to the which it is annexed, doth not impeach the credit of the said Ground; but being included therein, as aforesaid, *Format Regulam in omnibus casibus non exceptis.*

L. qua sit. ff. de fundo instructo.

But lest some men might thinke, that whatsoever is spoken in the said Dialogues touching equity, might bee onely understood of that equitie which either enlargeth or restraineth Statute Lawes, and of which M. *Plowden* in his Appendix unto the Argument of the case of *Eston* and *Studd*, in his second Commentaries so largely out

of

of *Ariſtotle*, and *Bracton* diſcourſeth. There followeth in the ſame place of the ſaid Dialogues, and in the chapter next enſuing are propoſed two Axiomes, Grounds, or Rules, with their exceptions, there put for example, and which doe tend to the purpoſe and proofe of that whereof wee now ſpeake.

And becauſe that thoſe ſaid Rules there mentioned are laſt of all here for example before propoſed, it ſhall be requiſite firſt of all to furniſh every of them with examples.

But yet for the better underſtanding of that which is behoofefull to be knowne concerning equity in generall, we are to note that every Rule with his exceptions or (to ſpeake otherwiſe in words) every received difference in the Law (being indeed nothing but a Rule or Ground and his exceptions) doth either flow from equity, or elſe reſult of the combining of two Rules together, as before hath beene declared.

The uſe therfore of equity is triple in our Law: For

The triple uſe of equitie in the Lawes.

1 Either it keepeth the common Law in conformity by meanes here mentioned.

2 Or it expoundeth the Statute Law.

3 Or thirdly giveth remedy in the Court of Conſcience in caſes of extremity, which otherwiſe by the Lawes are left unredreſſed.

Wherefore as all men endued with the right uſe of reaſon, and converſant in the knowledge of any Law, muſt of neceſſity confeſſe, that everie Law doth ſtand upon permanent Rules, as of Iron

not to be bent or broken upon this or that occasion, or to be infringed upon this or that occurrence (for elſe there need no Court of Law, but all ſhould be one with the Court of Conſcience, and have their proceedings framed according to the Arbitrary conceipt of the Iudge.) So likewiſe nevertheleſſe, upon every circumſtance of time, perſon, place, and the manner of doing, there falleth out ſuch matter of equity, that if Law ſhould bee purſued according to the ſetled Rules thereof, *Summum jus* (as *Cicero* ſaith) would prove *Summa injuria:* wherefore Law without equity were rigour. And yet againe, of the other ſide, if all Lawes ſhould change and be controlled as often in every caſe as equity would require, then ſhould there be (as aforeſaid) no Law certaine. And therefore it ſtandeth with good reaſon, that the common Law in ſome caſes, ſhould allow and follow equity, as farre forth as the conſtancy of the Law would permit, and for the better conformity of one Rule thereof with another: which common Law againe in other caſes ſhould refuſe equity for the better avoyding of confuſion.

Notes

EQuity therefore in all the uſe thereof, and in every of the threefold before mentioned obſervations hath a double Office, Effect, or Function.

Sometimes it doth amplifie.

Sometimes againe (when reaſon will) it doth diminiſh or extenuate.

A deſcription of the former is that which *Bracton* yeeldeth, *Æquitas eſt rerum convenientia quæ in paribus cauſis paria deſiderat jura, & omnia bene coæquiparat, & dicitur æquitas quaſi æqualitas.* *Lib. 1. c. 4. §. 5.*

This enlargeth the common Law; for it teacheth to proceed in the ſame from one caſe to another like thereunto; and ſo to proceed, that *Si aliqua nova & inconſueta emerſerint, & quæ priùs uſitata non fuerint in regno; ſi tamen ſimilia evenerint, per ſimile judicentur; cum bona ſit occaſio à ſimilibus procedere ad ſimilia.* *Com. 467.* *Bracton li. 1. cap. 2. §. 7.*

And therefore theſe caſes differing never ſo much in circumſtance, ſo that they doe concurre in reaſon, ſhould be ruled after one and the ſelfe ſame manner. For, *Vbi eſt eadem ratio, idem jus ſtatuendum eſt.* But hereof we ſhall hereafter have more ample occaſion to ſpeake, when we take in hand the laſt of *Ariſtotles* before remembred obſervations; namely *Similitudinum collectionem*, or *cognitionem.*

This equitie moreover in Statutes enlargeth the letter to caſes not comprehended within the words; if nevertheleſſe they doe ſtand in equall miſchiefe.

Laſtly, in all caſes of miſchiefe, for redreſſe whereof Poſitive Law or ordinary Rules of Law are defective; equity extendeth forth her hand in the Court of Conſcience to helpe therein the ſaid defect of the Lawes.

2 The ſecond kinde of equity doth againe of the other ſide reſtraine the ample or generall rules of the common Lawes by miniſtring exceptions, in like manner as is before remembred.

And in Statute Law it doth alſo limit the overlarge letter, drawing it wholly to, and keeping it within the bounds of the intent and meaning of the makers.

In the Court of Conſcience it giveth likewiſe comfort, conſidereth all the circumſtances of the fact, and is as it were tempered with the ſweetneſſe of mercy, and mitigateth the rigour of the common Law; and leaving the inflexible ſtiffe Iron rule, taketh in hand the Leaden Lesbian rule: which being rightly ſwayed in caſes of extremity, and therein, enjoyning the common Law of her ſtrait proceeding, iſſueth this ſentence full of comfort to the afflicted, *Nullus recedat à Cancellaria ſine remedio.* 4. Hen. 7.

Wherefore if the ſame equity bee uſed in ſuch caſes only as are of extremity (as indeed it ſhould) it cauſeth the Chancellour, into whoſe hand the managing thereof within this Realme is committed

to be in high eſtimation of honour: ſo that *In ejus ſorte juris dicendi gloriam conciliat magnitudo negotij, gratiam æquitatis largitio; in quâ ſorte ſapiens Prætor offenſionem vitat æquabilitate decernendi; benevolentiam adjungit lenitate audiendi.* Cicero in Orat. pro Murena.

And thus much by the way hath beene ſpoken of equity, upon the occaſion of ſpeech of exceptions which doe reſtraine Rules and Axiomes, that the originall fountaine from whence ſuch exceptions do ſpring, might the better and more manifeſtly be conceived.

And therefore thus much thereof ſufficeth, reſerving the reſt to his due and native place.

Now wee will proceed with the firſt example publiſhed in the ſaid Dialogues of the Doctor and Student, concerning the exceptions attributed and annexed unto Maximes, Rules, and Grounds.

There is (ſaith he) a generall prohibition in the Lawes of *England*; That

It is not lawfull for any man to enter into poſſeſſion or freehold of another without authority of the owner, or of the Law. The firſt Ground.

This Ground may be proved by many particular caſes and authorities: for the Law of propertie would that every mans owne ſhould bee private and peculiar unto himſelfe; and therefore it is ſaid, That

Neſt loyal al un de enter en mon terre ſauns mon licence. 12. H. 8. 2. b. Elliot.

Lou mes beaſts ſont damage feſant in autre terr, jeo ne puis enter pur eux eschaſer hors ains convient a moy 21. Hen. 7. 27. b. Kingſmel. Read.

moy primerment à tender amends.

If my beasts bee damage fesant in anothers ground, I may not enter and drive them out, but I ought first to tender an amends.

21.H.7.13. b. Rede. *Si home ad merisme gisant sur la terr d'un auter, il ne poit justifier le entry in le terr a veyer ceo si soit in bon plyte.*

If one have his timber lying on anothers ground, he cannot justifie his entry to see his timber in good case.

13.H.7.9.b. *Si maison soit lease a moy, & jeo mit mon biens en ceo, & puis mon lease expire les dits biens estant in le meason, nest loyal pur moy a ore pur enter en le dit meason de eux prender.*

If a house bee leased to mee wherein I put my goods, where they lye till the lease be expired, I cannot now enter into the house to take them.

14.H.8.1.b. Brudnel. *Si jeo mit mon chival in vostre stable & vous ne voiles ceo deliver a moy, & jeo enter & enfrend vostre stable, jeo sera puny pur l'entry, & le enfreinder del stable, mes nemy pur le prisel del chival.*

If I put my horse into your stable, and you will not deliver him unto me; if I enter and breake your stable, I shall bee punished for entring and breaking the stable, but not for taking my horse.

18.E.4.25.a *Si jeo command un a deliver a vous certaine beasts que sont en mon Park, nest loyal pur vous de enter en mon Park, & prender les dits beasts, oveque cesti que jeo issent command per reason de cest commandement; car vous purra assets bien eux receiver coment que vous demurres hors del Park.*

If I command one to deliver you certaine cattell

tell out of my Park, it is not lawfull for you to enter into my Park with him whom I commanded to deliver them: for you may receive the though you stay without the Park.

Si jeo baile biens al home, jeo ne puis justifier l'entry en son meason pur prender les biens, car ceo non fut per nul tort que ils viendra la mes per l'act de nous ambideux. 9.Ed.4.35.a 21.H.7.13.

If I deliver my goods unto a man, I cannot justifie the entring into his house to take them, &c.

Si le vicont ad fierifacias pur levier deniers recovers vers aseun, uncore si per force de ceo il ne voile enter et debruser le meason de cesti vers que le recovery fuit, il sera de ceo puny pur cest entry en trespas. 8. Ed.4.4.a

If the Sherife hath a *fierifacias*, to levie money recovered, if by force thereof he enter, and break the house of the debtor, he is subject to an action of trespasse.

Si un Vicar ad offrings in un Chapel de quel Chapel le franktenement est in moy; il ne pur ceo justifiera l'entry et debruser de ma Chapel pur eux prender hors. 2.H.4.24.a

If a Priest have offrings in a Chappell, the freehold of which is in me, hee cannot justifie the entry and breaking the Chappell to take out his offrings.

Si home esteant in sa Garren demesn springa un Feasant, et lessa sa falcon vola a ceo que vola in le Garren d'un auter home, & la prist le Feasant, nest loial pur le owner del falcon, pur enter in le auter Garren, & de la emporter. 38.E.3.10.b

If a man ſpring a Pheaſant in his owne Warren, and let his falcon flye at her, and ſhe flyes into anothers Warren, and there taketh the Pheaſant, he that oweth the Hawke cannot enter into the others ground to take her.

Having proved the former ground with theſe ſufficient former authorities, let us now deſcend unto the examination of ſuch exceptions of the ſaid propoſition, as may exemplifie our former ſpeeches; whereof ſome certaine being orderly delivered and confirmed with ſome authorities of booke caſes, I hold it ſufficient ſo to make manifeſt our meaning at this preſent; leaving a more exact conſideration thereof to more fit place and opportunity.

We are therefore to conceive that there is an infallible rule of Law, That

Le Common wealth eſt deſtre prefer devan aſcun private wealth.

The Common wealth is to be preferred before any private wealth.

By reaſon whereof leſt contradiction betweene the ſaid propoſed rule and this now in hand ſhould enſue upon ſome circumſtance which may fall out; therefore the ſaid laſt ſpecified ground, concerning the benefit of the Common wealth, doth miniſter an exception for the better underſtanding of the aforeſaid rule propoſed, namely, That

The firſt Exception. *Home poit iuſtifie ſon entre en le franktenement ou ſur le poſſeſſion de un auter ſi ſoit pur le benefit del Common wealth.*

A man may justifie his entry into anothers freehold, if it be for the good and benefit of the Common wealth.

And therefore these cases following depending thereupon are produced to prove and manifest the same.

Si jeo vien in vostre terre, et occide un Fox, un Gray, ou un Otter, pur ceest entry jeo ne sera my puny, pur ceo que sont beasts encounter le Common profit. 12. *Hen.* 8. 10. *a. Brooke.*

If I come into your ground to kill a Fox, Gray, or Otter, for this entry I shall not bee punished; for they are beasts against the common profit.

Pur le Common wealth meason sera plucked down si le prochein meason soit ardent. 13. *Hen.* 8. 16. *b. Shelley.*

For the good of the Common-wealth an house shall be pulled downe if the next be fired.

Et Suburbes del Citie seront plucked downe in temps de Guerr, pur ceo q̄, ceo est pur le common wealth: Et chose q̄, est pur le common wealth chascune poit faire sans aver action. 8. *Ed.* 4. 35. *b Littleton.*

And the suburbs of a City shall be razed in the time of warre: And that which is for the good and profit of the Common wealth any man may doe without danger of anothers action.

Home justifiera son entry in auter terr in temps de Guerr pur faire Bulwarke in defence del Realme, Et ceux choses sont justifiable & leial pur maintenance del Common-wealth. 21. *H.* 7. *b. Kingsmil.*

A man may justifie his going into another mans ground in time of warre to make a Bulwarke in defence of the Realme, &c.

Pur felony, ou pur suspicion de felony home poit de- 13. *Ed.* 4. 9. *a*

bruſer meaſon pur prender le felon, car il eſt pur le Common-wealth pur prender eux.

For felony or ſuſpition thereof a man may breake a houſe to take the Felon; For it is the good of the Common-wealth, to have him taken: With ſuch like.

Moreover becauſe there is another Rule of Law, That

Nul prendra benefit de ſon torts demeſne.

No man ſhall take benefit of his owne wrong.

And ſometimes it falleth out that men, through malice to have others in danger, would not ſticke to lay a traine to intrap them, to the intent, that they might, by ſome colour, for their further vexation, proſecute ſute againſt them; To uphold the Conformity of Law upon thoſe two grounds, that one of them doe not encounter the other, there is a ſecond Exception to the former Rule namely, That

The ſecond Exception.

Si home ſoit le Cauſe pur que un tortious Entry eſt fait ſur ſon Poſſeſſion, il navera de ceo Remedy: mes le party que ad iſſent enter, ſur le matter diſcloſe poit ayd luy meſme & juſtify tiel Entry.

If a Man bee the cauſe that a wrongfull Act or Entry be made upon his poſſeſſion, he ſhall have no remedy for it, but the party who hath entred may diſcloſe the matter to juſtifie his entry.

9. Ed. 4. 35. a.

Home ad un Molyn, & l'eaw courge per le terr d'une auter al dit Molyn, le Tenant del terre miſe ſtakes deins le dit eaw ſur q. il edify un meaſon, per reaſon de quel l'eaw ne poit vener cy bien al dit Molin come devant: Le Tenant del Molyn enter en la dit terre, & enraſa

les

les ſtakes, per q. la dit Meiſon eſchew: Et in Treſpas pur entry en la dit terr & enraſer la meaſon; tout ceſt matter pur avoider le dit Nuſance fuit plede per le defendant & tenus bon Iuſtification.

A Man hath a Mill, and the water running to it commeth through anothers ground, and hee faſtneth ſtakes upon the ground in the water, and buildeth an houſe; by reaſon whereof the water commeth not to the Mill, as well as in time paſt, the Miller entreth unto the others ground and breaketh downe the ſtakes, and thereby the houſe falleth; If the other bring an Action of treſpaſſe againſt him, for this, he may ſhew that hee did it, to avoyde wrong done to himſelfe, and juſtifie the deed.

Home aver pris les beaſts de I. S. & eux impound in ſa terre, & vint un pur Replevy meſme les beaſts, Et pur ceo q. ceſt q. ad eux deſtreine ne voilet ſuffer les beaſts deſte Replevy, il ove arks & ſagitts, ſagitta al ceſti q. vint pur eux repleuy eſteant in le port de meſme le cloſe, lou ils fuere impound, pur q. il pur doubt enfreint le cloſe in auter lieu, & enchaſe hors les avers q. fueront impound; Et per ceſt entry et infriender del Cloſe, le Plaintife port treſpas, Et ſur tout ceſt matter diſcloſe ceo, ſemble bone Iuſtification. 20. Hen. 6. 28. a.

A man having taken *I. S.* his goods, and impounded them in his owne ground, a Replevin was brought for thoſe Cattle, and hee that deſtrained them would not ſuffer any Replevin to be made, but ſtanding in the gate of the Cloſe where the Cattle were impounded, ſhot at him that came to make the Replevin, whereupon he

broke the Close in another place, and drew forth the said beasts: For which breaking the Plaintifes Close, he brought an Action of trespasse; but upon this matter disclosed, it was taken for a good justification.

21. Hen. 6. 39. b. *In travers, le defendant dit, q. pur ceo q. le Plaintife violet aver le defendant in son dainger, il commaund un son servant de chaser les beasts de defendant in les blees del plaintife mesme, & le defendant cy hasti ment q. il avoit notice de ceo, il enter en le dit terre le Plaintife, et eux enchase hors: Et ceo fuit tenus bon Plea nient amountant al generall issue.*

9. Ed. 4. 35. a Littleton. In an Action of trespasse, the Defendant said, that because the Plaintife would have the defendant within his danger, hee commanded one of his servants to drive the Defendants beasts into the Plaintifes Corne; And the Defendant assoone as he had notice thereof, entred into the Plaintifes Close, and drave them out; This was taken for a good Plea, and not amounting to the generall issue.

37. Hen. 6. 37. a. b. *In travers pur entry in le close, &c. Del Plaintife le defendant justifiera, pur ceo q. le Defendant fuit Chivanchant en le roial chimin q. gisoit pres le meason del Plaintife, quand il vint la encounter la dit mese, la vient le Plaintife ove Arke et sagitts et fist un assault sur le defendant, pur que il avoide son Chival, & fua in le dit mese, & ouster in le dit close; Et puis reveint in le dit chimin. Et ceo fuit tenus bon Iustification, si il voile adde a ceo q. le Chymin est in mesme le ville q. le meason est, ou in quel ville ceo est, & q. le huis del meale fut overt*

al

al temps : per q. le defendant iſſint diſt accordant.

In an Action of Traverſe for entering into the Plaintifes cloſe, the Defendant juſtified, for that he ryding in the Kings high way, which lay neere to the Plaintifes houſe, the Plaintife ſet upon the Defendant, when hee came neere againſt the Plaintifes houſe, and aſſaulted him with bow and Arrowes; Whereupon he forſooke his horſe and fled into the houſe, and ſo through it into his Cloſe, and after returned into the high way; And this was taken for a good juſtification, if he had ſhewed further that the high way was in the ſame towne where the houſe was, and ſhewed in what towne the houſe was, and that the doore of the houſe was open, &c.

Moreover, where there is a ground or rule of Law, as hath beene often before remembred, That

Quando aliquis quid concedit, & id concedere videtur ſine quo res conceſſa eſſe non poteſt.

Hereof enſueth a third Exception to be annexed unto the ſaid former Ground: in this manner,

Si home ad intereſt ou authoritie derive de aſcun perſon, owner, & poſſeſſor del ſoile : lequel ceſty a q. le intereſt ou authority eſt done, ne poit accomply ſans Entry in la terr ou meaſe de ceſti q. iſſent done la intereſt ou authority, la ſon entry eſt imply in la dit intereſt ou authority : Et pur tiel cauſe ſon entry la ſera juſtifiable. The third Exception.

Le Abbe de Hyde fait leaſe d'un ferm rendant Rent a ſon Monaſtery de Hyde, tandem le dit Monaſtery vient al mains le Roy, Hen. 8. per le ſtatute de Diſſolu- Com. Kidm & Brand. 71. a.

tions,

tions, q. puis ceo grant ouster al estranger : le lessee del dit ferme poit bien venir al dit Monastery la a tender la dit Rent, Et cesti q. ad le possession de ceo navera eint travers pur tiel entry.

Com. Kidw. & Brand. 71.b. Si A : soit tenus a B : in un obligation de 20. l. pur pair a luy 10. l. a tiel jour la intent q. nul lieu est extres pur le payment, A : est tenus a querer B. in quocumq. liew q. il soit : Et si B : est in son meason demesne, & vient a luy la, & tender le argent, il ne sera tresspasser pur le vener la Mes si ust este in la meason de ascun auter home, la il seroit tresspasser al dit home : Mes in l. auter cas intant q. il fut assentant q. il paiera a luy les dits deniers, & in ceo fut il containe q. il fut assentant que il vener a luy pur ceo purpose : il ensuitt ex consequenti que il ne puniera luy pur ceo chose a que luy mesme fut privy & agreement.

18.E.4.25.b Si jeo enfeoffe G. & face litre d'atterney a C. a deliver seisin a G : pur le veinder sur la terre, et pur l'entry fait per G. de prender la livery, G. ne sera punish in tresspas; car il est impossibile que il receivera livery si non il entra in le terre, et il est imply in le fesance del feofment que il viendra sur la terr de prender Livery.

9.Ed.4.25.a. Si home moy grant pur foder in son terre, & de faire un trenche de tiel font ou spring jusques a mon place, si
13.H.8.15.b Inglefield. puis le Pipe est estopp ou enfreint issint que l'eau issue hors, jeo ne poi foder in son terre pur mender le Pipe, car ceo ne fut grant, a moy, &c. Mes cest opinion fut deny per tout le Court, car fut dit, que il poit enter & foder pur ceo mender, pur ceo que est incident a tel grant a ceo discourer & d'amender.

9.Hen.6.29.b. In travers pur entry en un meason le defendant dit

dit que long temps devant le treſpas que A. fut ſeiſi del dit meaſon in fee, & q. ceo eſt in tiel ville & deviſable per teſtament, per que le dit A deviſe le dit maiſon a un fem in taile, & que ſil devy ſans iſſue que ſon Executor ceo vendroit, & fait le defendant ſon Executor & devy, la fem entermary ove le Plaintife & puis devy ſans iſſue, pur que le defendant enter ſur le poſſ': le Plaintife a voir, ſi fut bien repaire a lintent de ſcavoir a quel value le reverſion fut a vender, & ceo fut tenus bone Iuſtification.

In Treſpas pur Entry in meaſon & priſel del biens le defendant dit que le Baron del Plaintife fut poſſeſſes des dits biens & fuit ſeiſy del dit meaſon in fee, et fait le defendant, & auter ſes Executours, et devy poſſeſſes des dits biens, & le defendant vint al dit meaſon apres la mort le Teſtatour pur adminiſter & trovant huys del dit meaſon overt il enter & priſt les biens, et ceo fut tenus bon Plee per tout le Court. 2. Hen. 6. 13. b. 16. a.

By reaſon alſo that there is a Rule of Law, That

Le poſſeſſion del terre de cheſcun home eſt ſubject al Iuriſdiction del ley.

Thereof alſo this Exception following holdeth likewiſe place in reſtraint of the ſaid former generall Rule or Ground, that is to ſay,

Lou le ley done al aſcun authority de enter in auter ter ou ſur le poſſeſſion del auter, il juſtifiera ſon entry. The fourth Exception.

Si jeo ſuy ſeiſi de terre in fee ſur bon & indefeſible title, et un eſtranger demand ceſt terre per precipe vers un auter eſtranger, & ſur ceo le vicount per force del precipe vient ſur la terre ove ſommoners, & ſummon luy vers que le precipe eſt port, & puis le demandant Com. Manx. el 13. a.

recover vers luy per default ou per issue try sur certaine point, & perforce de Haberi facias seisinam le vic' vient arere & mist cesty que ad recover in seisin; jeo ne puniera le vicont pur le primer vener, ne pur le second vener in le terre, pur ceo que le vicont ne fait riens mes execute le mandement le Roy come il ad in charge, & mon Possession est chargeable a cest Iurisdiction del Roy & ses ministers.

Littleton Villenage. Com. Manxel 13. a. *Si home fait lease pur vie, & un villeine purchase le reversion, semble a Litt. que le signior del villein poit maintenant vener al terre et claime mesme le reversion, et per tel clayme le reversion est maintenant in luy, et pur tel vener a le terr et act fait il nest trespassor.*

Com. Manxl 13. a. *Si villein purchase advowson plen d'incumbent, le signior del villein poit vener al dit Esglise, et claime le dit advowson, et pur ceo le Incumbent ne punishera luy per tiel vener al dit Esglise.*

11. H. 4. 75. b *In Trespas le defendant plede que il fut seisy del meason et terre et ceo lease al plaintife pur terme de ans, et que fut certifie que wast fut fait, et il enter in le close & meason pur viewer si wast fut fait, et le huis del maison fuit overt, & demand Iudgement, et ceo fut tenus bon barr; a que le Plaintife replica que il la demurr encounter le volunt le Plaintife un jour et un nuict, &c.*

Hitherunto have we expressed certaine exceptions of the fore-specified Grounds which are derived from the reason of some other grounds and Rules of the Law, and which reason would should be added, as restraints unto the said former Rule of Law first remembred for conformities sake,

and

and that the Law no way be impeached of contrarieties. Now resteth also that we deliver some few other exceptions unto the said generall Rule drawne likewise from the fountaine of equitie; which are such as doe ensue.

Exceptions ministred by equity.

Sith it were voide of all reason and conscience that a man should punish a wrong done unto him, by the which he either sustaineth little or no detriment or damage, or at leastwise more benefit then he sustaines prejudice: Therefore this exception unto the said generall Rule, is among other likewise allowed for Law. That

The fift Exception.

Lou le party sur que possesion home fait tortious entry, est plus benefit per tiel entry que prejudice, la home bien justifiera la dit tortious entry.

Which the cases following do likewise at large sufficiently confirme.

12.H.8.2.b. Pollard.

Si jeo suy in peril deste murder in mon close, ou in mon meason, il est loial a chescun de enfrender mon meison ou close pur moy ayder, et pur ceo que est pur mon benefit.

13.H.8.15.b. Norwich.

Si jeo voy vostre beasts demesne in vostre corne, et jeo eux enchase hors, jeo ne sera my puny pur ceo que fut pur vostre advantage, et vous aves interest in les beasts. Mes si jeo chase les beasts d'un estranger hors de vostre corne, jeo serra puny pur ceo; car vous puisses aver remepy pur ceo; scil. per distresse.

21.H.7.27.b. Palmes.

Si jeo view le Chimney de mon voycin urant pur saver les choses que sont deins son meason, jeo justifiera l'entry in le meason, & deprender les biens que jeo trover dedans pur eux saver.

20.H.6.37.a

In tresspas de Parco fracto, le defendant justifie le

treſpas pur ceo que fut controverſie perenter luy, & le ſeigneur de Huntingdon Plaintife pur le overture d'un gorce, et pur ceo que le dit ſeigneur fut in le dit Park hunting, il enter pur les portes eſteãt overt a monſtre a luy ſes evidences concernant le dis gorce & ceo fut tenus per tout le Court bone Iuſtification.

Againe, the like equity doth miniſter one other exception of the like quality; for it were unconſcionable and unreaſonable that a man ſhould be puniſhed for a wrongfull entry, wheras he is compelled ſo to do, and cannot without his great prejudice eſchew the ſame: And therefore it is holden for Law, That

The ſixt Exception.

Si home enter ſur le poſſeſſion de un auter, len il ne poit auterment faire ſans ſon grand prejudice, ceo ne ſera deemetiel entry de que il ſera puny.

13.H. 8.16. b.Browne.

Si home ad Querck creſſant in midds de trois maiſons, et il decoupe ceo, et le Querck eſchuet in terre d'un auter, ſi il juſtify in treſpas il covient de alleager que il ne auterment puit faire.

6.Ed. 4.7.b.

Home de coupa thornes que creſſe in ſon terre & ils eſchaont inter d'un auter, & il enter & eux prender hors, ſil ne poit in auter maner faire, ceo luy excuſera.

Doctor and Student. ver. 10.Ed.4.7.b 22.Ed.4.8.b. 6.Ed. 4.7. b.

Si home chaſe avers per le chymin, et les beaſts happont de eſcuper in les blees de ſon vicin, & ceſty que eux enchaſe enter freſhment in le terr de eux enchaſer hors, pur ceo que ils ne ferront aſcun damage, il juſtifiera tiel ſon entry in treſpas.

And thus much hath beene ſaid touching the firſt Ground propoſed in the ſaid Dialogues of the ſaid Doctor and Student, which hath beene proved

proved in particular with caſes, and thereunto have beene annexed certaine exceptions which have likewiſe beene fortified with *Booke Caſes*, and Authorities, whereby the former aſſertions have not onely beene exemplified, but alſo thereby it doth plainly appeare, That almoſt every diſpoſition in the Lawes, *de qualitate*, or *de jure*, is in conference of Maximes, and reſteth betweene the Rule and the Exception, which is either miniſtred by reaſon of equity, or upon ſome other Rule or Axiome. So that every difference ſhewed betweene Caſes, is nothing elſe but the Rule and his exceptions; the effect whereof briefly is ſet forth by *Morgan*, who ſaith: That

Maximes ne doient eſte impugne, mes touts temps admit; mes les maximes per reaſon poient eſte confer & compare l'un ove l'auter, coment que ils ne varient: Ou per reaſon poit eſte diſcuſſe quel choſe eſt plus prochein al Maxime ou meane perenter les Maximes & quel nemy: mes le Maximes ne unque poient eſte impeach ne impugne, mes touts dits doient eſte obſerve & tenus come firme Principles de eux meſmes. Com. Colib. 27.a

For the better underſtanding whereof, we may note that all matters of debate which may be referred to the controverſies or queſtions *de qualitate* or *de jure*, as hath been ſaid, have either commonly a Maxime of the one part, & a Maxime of the other; or ſeverall reaſons of each part derived from ſundry Maximes; or elſe that there is a Maxime of the one part, and there is equity and reaſon which doth miniſter an exception to that Maxime or generall Rule: So that all diſceptation

tion herein is, as hath beene ſaid, in conference or comparing of Maximes and Principles together, diſcourſing which thing is directly under the reaſon of the ſaid Maxime; and what matter or circumſtance may make a difference, and will be by exception exempted from the ſame; as more at large hereafter in the declaration of the uſe of theſe Maximes may be made manifeſt and apparent.

Now reſteth moreover to proſecute the ſecond Axiome or Principle propoſed in the ſayd Dialogues, namely, that which followeth there in the ſevententh chapter of his firſt booke, that is to ſay:

The ſecond Ground. It is not lawfull for any man to enter upon a deſcent.

Which ground being expounded by *Littleton* in his chapter of deſcents to extend onely to deſcents of an eſtate of Inheritance and freehold, and not of a reverſion or remainder, all which follow after in the ſayd Chapter, are nothing but Caſes of Exceptions unto the ſaid Grounds, as it is evident unto every one that conſidereth the ſame, and therefore ſhall it here bee needleſſe long to inſiſt thereupon. Nevertheleſſe it ſhall be expedient to ſhew ſome exceptions therunto, eſpecially ſome certaine, of ſuch of them as being exceptions unto the ſaid Rule, are againe reſtrained with other exceptions. Becauſe there is a Rule of Law, That

Firſt exception Littleton Garranty 279. *Laches ou folly ne ſera impute a un enfant de luy prejudice.*

There-

Therefore leſt contrarietie might happen in conſequence of reaſon betweene the ſayd Rule of deſcents, and this Rule laſt remembred: there is miniſtred by the meanes of this latter Rule, an exception unto the ſaid former ground, namely, That

If an infant have right of entry, hee may enter upon a deſcent. *Littleton deſcents cas.* 402

This exception, although it doth import great probability of truth, yet is the ſame like unto the Ground in this reſpect, namely, that it is alſo ſubject to bee reſtrayned with another exception, *viz.* 20. *H.* 6. 28. *b*

If an infant, or ſuch priviledged or excepted perſon have a right of entry, and a deſcent of thoſe lands is had to one that hath a more ancient right; the party having ſuch ancient right ſhall be remitted: and both the right and entry of the infant taken away.

And this exception enſueth of another general Rule of Law, which is, That

An ancient right ſhall alwaies be preferred before another meane right or title.

The ſaid exception upon exception, grounded upon the laſt remembred Rule, may bee plainly proved by this caſe.

If Tenant in Taile do diſcontinue and after do diſſeize his diſcontinuee, and during this diſſeiſin the diſcontinuee dyeth, his heire within age; and after the Tenant in Tayle doth dye ſeiſed; and this land deſcendeth unto the iſſue in tayle, the heire of the diſcontinuee being ſtill within age; 11. *E.* 4. 1. *b.*

This

This is a remitter, and the entry of the heire of the diſcontinuee is tolled, notwithſtanding that the Ground and Principle is, that the laches of the infant ſhall not prejudice the infant. And the cauſe is the ancient right the iſſue had.

The ſecond exception.

Moreover the former Generall Rule touching deſcents that toll entries, hath among other, alſo this exception.

Litt.fol.59. caſe 403. 9.H.7.24.a. 2.Ed.4.24 a 7.Ed 4.7.b. 20.H.6 28.b

A deſcent had during the Coverture, ſhall not toll the entry of the woman or her heires after the Coverture diſſolved.

But becauſe there is a Generall Rule of Law, That,

None ſhall be favored in any Act wherein folly may be imputed to him.

From whence is derived alſo this more ſpeciall Rule or Ground.

Com. Zouch. 366. a. 42.E.3.12.b 9.H.7.24.a.

Coverture ſhall not ayde a woman where the taking of a Husband which reſpecteth not her benefit may be imputed to her folly.

Hereof enſueth this exception upon exception to the ſaid former remembred Rule, That

42.E.3.12.b 9.H.7.24.a. Litt.fol.95. cas.404. 34.Ph.Ma. 144.n.57.

Where folly may be imputed to the woman for taking of ſuch a Husband as will be heedleſs of her benefit, there a deſcent, during the coverture ſhall bind the woman and her heires.

Much more might bee ſaid of like effect, but this for example ſake ſhall ſuffice.

Now reſteth briefly to ſay ſomething touching the firſt propoſed Latine Rules: Of which the former was this,

Com.72.b. Com. 268 a. Com. 294. a.

Sublata cauſa tollitur effectus.

This

This Rule is not absolutely true; for the Philosophers from whence it is borrowed, doe understand it, *De causis internis, non de externis.*

The Civill Lawyers do restraine it in this manner, *Hæc autem Gnosis sine Regula, de causa finali, non de causa impulsiva intelligitur.* Pratam.

The common Law of the Realme, thus;

Sublatâ unâ causâ, si alia remanet, non tollitur effectus.

The second Rule; which was this, *Qui tacet, consentire videtur,* is verified with this exception.

Si ad ejus commodum & utilitatem spectat, præsens & tacens pro consentiente habetur. Pratens l. 7. c. 3. fol. 911.

The third Rule was this,

Quod initio non valet, id tractu temporis non convalescit.

Which Ground may be confirmed with many cases, yet is the same Ground restrained with this exception, because That

Habet locum in his tantum quæ statim debent valere, & nullam suspensionem habent. Decius.

If a man make a lease for life of land unto *I. S.* and after doth make a lease for yeares unto *I. N.* of the same land to beginne presently, This lease being made by word is voyd; for the freehold in the first lease is more worthy, and by law intended to be of longer continuance then the terme in the second lease: yet if the first leasee die, or surrender afore the second be expired, the residue of the terme is good. 37. Hen. 8. Brooke. Leases 48. Com. Smith & Stapleton 433. a. Com. Griesbrooke. 422. a.

If the father devise his land unto his daughter

and Heire apparant, and after leaving his Wife *encinct*, or with child with a ſon, upon the death of the father this deviſe unto the daughter is void for that ſhe is his heire; but after, when the ſonne is borne it is good.

3. Ed. 4. 6. Per Billing quod ſuit conceſſum & Abridge per Fitzh. tit: Aſſi. 27.

The fourth Rule of the ſaid Latine rules before ſet downe, was this,

Quando duo jura in uno concurrunt, æquum eſt acſi eſſet in duobus.

This Rule hath exception grounded upon another Rule, that is, That

Com. 375. b. *Vigilantibus & non dormientibus jura ſubveniunt.*

Or to the ſame effect;

Vnicuique ſua mora nocet.

And therefore

Com. Stowell. 372. b. *In cauſes de negligence ou laches divers droits concurrant in un perſoune ſeront deeme ſi come ils fuſtent in divers perſons.*

Where, if *Tenant pur auter vie* be, the remainder for life over to another, the remainder in fee to the right heires of the *Tenant pur auter vie*, If the ſaid *Tenant pur auter vie* be diſſeiſed, and the diſſeiſor levie a fine with proclamations, and the five yeares doe paſſe, and after *Ceſti que vie* dyeth; and after alſo dyeth he in remainder for life; he which was *Tenant pur auter vie*, ſhall not have other five yeares after the death of the *Tenant* for life in remainder to purſue his right for the feeſimple.

Vpon like reaſon, if a Biſhop bee ſeiſed of an Advowſon in the right of his Biſhopricke, and the

the Church become voyd, and ſixe moneths doe paſſe; the Biſhop ſhall not have other ſix moneths as Ordinary, the ſame Church being in his Dioceſſe, as he ſhould have if the ſame Church were of the patronage of another perſon, although he be in one reſpect Patron, and in another Ordinary.

Hitherto wee have entertained diſcourſe as touching the verity of Axiomes, Rules, and Grounds; which, as hath beene ſhewed, is either neceſſary or contingent.

Contingent verity was divided into two branches; the one reſting upon the entendment of Law; the other being derived from the diſpoſition and nature of humane things, by debate and diſcourſe of reaſon.

Of the firſt ſort there are two kinds; for ſome propoſitions there are, although of themſelves but only probable, yet nevertheleſſe are ſuppoſed of ſuch certainty, that no averment ſhall be received to encounter the ſame. Otherſome, although they be by the Law intended true, *Prima facie*, yet nevertheleſſe the ſame Law alloweth an averment, and admitteth proofe to impeach the ſame.

Thoſe moreover which reſt upon diſcourſe, of reaſon, are ſubiect to divers exceptions, the materiall cauſe whereof is, the infinite variety of circumſtances that in all humane actions doe happen.

The forme and nature of the exception is perceived

ceived and knowne by this effect following; in that it restraineth the ground unto which it is connexed.

The efficient causes are two, *viz.* Equity or some other Ground of the Law importing contrariety. And the end thereof is conformitie and coherency of Law agreeable unto Iustice, whose minister the Law is.

Moreover as occasion hath beene offered in the declaration of the causes from whom Exceptions of Rules doe spring, there hath beene shewed the use of equitie in the common Law, Statute Law, and Chancery, by the two effects thereof, application and restraint; the one enlarging, and the other abridging.

Wherefore now resteth to speake of the second principal part, concerning the forme of Aixomes, namely, generality: The consideration whereof, bringeth to memory, that GOD in his most excellent worke of the frame of transitorie things, though hee hath furnished the world with unspeakeable variety, thereby making manifest unto all humane creatures, to their great astonishment, his incomprehensible wisedome, his omnipotent power, and his unsearchable providence, yet being the God of order, not of confusion, hath admitted no infiniteneſſe in nature (howsoever otherwise it seeme to our weak capacities) but hath continued the innumerable variety of particular things under certaine specialls; those specialls under generalls; and those generals

a-

againe under cauſes more generall, linking and conjoyning one thing to another, as by a chaine, even untill wee aſcend unto himſelfe, the firſt, chiefe and principall cauſe of all good things. And this is that which *Plato* out of *Homer*, was wont to call *Iupiters golden chaine*.

The eye whereby we doe ſee and view, and the inward hand whereby wee doe reach and apprehend theſe things, is mans underſtanding, which is wholly imployed about univerſality as about his proper object, by meanes wherof, in all things rationall, being diſcovered by the uſe of reaſon, mans underſtanding for the attaining of knowledge proceedeth from the effect to the cauſe, and againe from the cauſe to the effect; that is, from the particular to the ſpeciall, and from the ſpecial to the generall; and ſo to the more generall, even to a principall and primary poſition or notion, which needeth no further proofe, but is of it ſelfe knowne and apparant. And ſo againe from ſuch chiefe & primary Principles and propoſitions to more ſpeciall and peculiar Aſſertions, deſcending even to every particular matter.

But that, of this which hath beene ſaid, ſome example might be ſhewed, eſpecially in this matter, which we now have in hand, namely, concerning the Grounds & rules of the Law of *England*; let one of the propoſed grounds firſt before mentioned ſtand here for an example, *viz.*

Nihil eſt magis rationi conſentaneum, quam eodem modo quodque diſſolvere quo conflatum eſt.

This principle being a Rule of Reason contayning great probability, and being of the number of those that before we said to have beene derived from the obſervation of the nature of things, which though it bee ſubiect to manifold exceptions, yet nevertheleſſe as a generall Rule, the ſame is verified in many ſpeciall Axiomes; and they againe diverſly ſubdivided into many more peculiar propoſitions; as the example of theſe following may make manifeſt.

1 *Ceſty que eſt charge per Record doit luy diſcharger per Record.*

2 *Ceſty que eſt charge per fait doit luy meſme diſcharge per fait, ou per auter matter cy haut.*

3 *Ceſty q̄. eſt charge forſq̄. per parol, poet eſte diſcharge per parol.*

Of which generall Propoſitions there can bee made no better reaſon then by the commemoration of the ſaid firſt aforeſhewed generall Rule.

Moreover, the firſt of the laſt above remembred comprehendeth under the generality thereof certaine other more ſpeciall Rules:

As

In det ſur arrerages de accompt que eſt matter de Record, le party doit diſcharger luy per matter cy haut, & nemy per ſpecialty, ou fait ou auter matter que neſt cy haut. 6.*Hen.*4.6.*a.* 3.*Hen.*4.5.*a.*11.*Hen.*4.79.*b.* 13.*Hen.*4.1.*a.* 8.*Hen.*5.3.*b.*3.*Hen.*6.55.*a.* 4.*Hen.* 6.17.*b.*20.*Hen.*6.55.*b.*

In det ſur recovery, home ne ſera diſcharge mes per matter cy haut: ou a tiel effect, 6,*Hen.*4.6.*a.*

Vnder

Vnder the second Rule or Ground before proposed touching a discharge where the party is charged by matter of specialty; those speciall Rules following are likewise comprehended.

In nul case home ne poit avoide single obligation, sans auter specialty de auxy haut nature, 1. *Hen.*7.14. *b.* 5. *Hen.*7.33. *b.* 11. *Hen.*7.4. *b.*

Home que ad enfreint covenant ne pledera matter in discharge de ceo sans fait, 3. *Hen.*4.1. *b.* 1. *H.*7.14. *b.* 21. *Hen.*6.31. *a.*

Home ne discharger a luy meisme dun annuity que charge son person sans specialty, 5. *Hen.*7.33. *b.* 35. *H.* 8.51. *a. Dyer.*

The first rule of these last remembred Grounds, namely, touching obligations, is againe divided into divers particulars; as for example.

Arbitrement ne dischargera home de un duty due per un obligation, 8. *H.*7.3. *b.* 6. *H.*4.6. *a.*

Si le obliges deliver l'obligation al obliger come acquittance, & puis ceo prist de luy, & commence sute sur ceo, ceste delivery ne sera discharge del obligation, 1 *Hen.* 7.17. *a.* 33. *Hen.*8.51. *a. Dyer.* 22. *H.*652. *b.*

The other following concerning indentures of Covenants, may likewise be divided into other more particular assertions: but to avoyde tediousnesse, these already shewed abundantly manifest our meaning, and therefore may suffice.

The use of this kind of observation of the generality of Rules and Propositions is manifold. The use of generall Rules, and the observations of their specialls.

First, things proposed in the generality are best knowne and most familiar to our conceipt, sith

ſith they be the proper object of our underſtanding, as before is declared.

Secondly, they doe better adhere and ſticke in memory, ſith Intellective memory is (as the underſtanding is) imployed about univerſall and generall things.

Thirdly, univerſall Propoſitions are the precepts of Art, and therefore they are called perpetuall and eternall: for no Art, Science, Method, or certaine knowledge can or may conſiſt of particularities: for the orderly proceeding of every Art, Methodically handled, is from the due regard had of the generall, to deſcend unto the ſpecialls contained underneath the ſame: wherefore it enſueth hereof, that generall Propoſitions are the moſt ſpeedy inſtruments of knowledge: for experience, which wholly is gotten by the obſervation of particular things (being deprived of ſpeculation) is ſlow, blinde, doubtfull, and deceiveable, and truly called the miſtreſſe of fooles.

IF perchance upon occaſion of ſome former ſpeeches here publiſhed touching the univerſality of Grounds, there bee demanded this queſtion.

Queſtion. Why the Lawes of *England* at the firſt and from time to time, had not beene publiſhed after this Method of generall and ſpeciall Rules with their exceptions.

I anſwer

I anſwer thereunto, that many ancient writers attempted that kinde of writing, and accompliſhed the ſame according to their ſeverall and ſundry gifts more or leſſe perfect each than other: as by the treatiſes of *Glanvile*, *Bracton*, *Britton*, and others appeareth. Anſwer 1.

Secondly, I ſay that foraſmuch as dayly new queſtions came in debate whereof before had bin no reſolution, and wherein many times the leaſt variety of circumſtances doth alter the Law; therefore our Anceſtors thought it more convenient, to be rather governed by an unwritten law, not left in any other monument, than in the mind of man; and thence to be deduced by deceptation and diſcourſe of reaſon: and that when occaſion ſhould be offered, and not before. 2

Thirdly, it is more convenient and profitable to the ſtate of the common wealth to frame Law upon deliberation and debate of reaſon, by men skilfull and learned in that faculty, when preſent occaſion is offered to uſe the ſame, by a caſe then falling out and requiring Iudiciall determination: for then is it likely, with much more care, induſtry and diligence to bee looked unto; and much more time of deliberation is there taken for the mature deciſion thereof, then otherwiſe upon the eſtabliſhing of any poſitive Law, might bee imparted concerning the ſame. 3

Laſt of all, ſith all good Lawes require perſpicuity and plainneſſe; and that in generality, for the moſt part, lurketh *obſcurity*; therefore there is nothing of more force and effect touching the 4

making and framing of a good Law, then the present occasion offered, sith thereby is brought to light, that which otherwise would not as much (many times) as be thought upon, and giveth occasion to dispute that which none would have thought ever should have come in question. And therefore not without due consideration among the Romanes, *Disputationes fori*, and with us *Demurrers* have ever beene allowed as originals of Law.

As touching the manifestation of Rules, all are affirmative or negative: wherein though the affirmative be, for many causes, the more worthy; yet such negation as implyeth affirmation (and therefore called pregnant) is not without some use in the setting downe and delivering of exceptions and generall Rules. And thus much touching the forme of Rules, Grounds, and Axiomes.

The efficient cause of Rules, Grounds, and Axiomes is the light of naturall reason tryed and sifted upon disputation and argument. And hence is it, that the Law (as hath bin before declared) is called reason; not for that every man can comprehend the same; but it is artificiall reason; the reason of such, as by their wisedome, learning, and long experience are skilfull in the affaires of men, and know what is fit and convenient to bee held and observed for the appeasing of controversies and debates among men, still having an eye and due regard of justice, and a consideration of the common wealth wherein they live; for well saith

Arist. l. 3. Pol. c. 7. *Aristotle, Hoc quidem perspicuum est, leges pro ratione Reipub.*

Reipub. esse scribendas. And of this reason that we speake of, *Tully* hath a notable saying. *Ratio est societatis humanæ vinculum, ut oratio, quæ dicendo, communicando, disceptando, judicando, conciliat, inter se homines conjungit, & retinet naturali societate.* Wherefore sith the Grounds of Law are the foundation of Law, or at leastwise the Law it selfe delivered in manner of compendious and short sentences & propositions; that which is the efficient cause of Law, must likewise be the efficient cause of those Rules and Axiomes. *Cic. 1. Offic.*

Inasmuch then as *Primaria efficiens causa juris, est natura & ratio civilis, ex quibus potissimum leges emanant, & veluti scaturiunt.* The same nature and reason are likewise the principall and originall efficient cause of the Rules, Axiomes, Grounds, and Propositions of the Law; I meane *Civilis ratio*, that is, reason respecting justice and the Common wealth. *Johannes Corasius de arte juris lib. 1. cap. 20.*

This reason hath in the written workes of the Lawes of this Land, either been plainly published and expressed in the bookes of Law, upon deception of cases in debate, and left unto posterity, as the Lights, Rules, and Directions, whereby the said cases so called into question, were at the last decided and determined.

Or else it is not at all expresly published in words, but left nevertheless implyed and included in the cases so decided, and therein doth as it were lye hidden; and yet nevertheless to bee easily, with industry collected, and inferred upon those Cases decided, and doth necessarilie

follow upon the resolution of the same, and being thence drawne, may aboundantly serve to infinite uses, in the determinating of other doubts, which daily doe and may come in debate. Wherefore sith in the Law (as in other sciences) all arguments and disputation doe either consist of expresse proofe and allegation of Authority (which are called *Inartificiall Arguments*) or else of application and inference; as well the Rules to bee collected upon inference and application of other Cases, are to be regarded and to bee produced, as those which are direct authorities. And forasmuch as in very few cases of doubt newly rising in debate, and called into question and controversie, expresse proof and pregnant authority can be found; the Lawyer is most beholding to Inference and Application, wherewith he is instructed and taught, that Cases different in circumstance, may be nevertheless compared each to other in equality of Reason; so that of like Reason, like Law might be framed. And by how much Application and Inference doth more depend upon wit and Art, than the producing of expresse Authoritie; by so much the more it excelleth the same, sith the Allegation of expresse Authority, resteth wholy upon Industry and Memory in publishing and noting that which he findeth already framed to his hand.

Expresse Rules, Axiomes, Grounds and Positions of the former sort are published in the bookes of Law, either in the Latine tongue, as are the former generall rules first mentioned, and also

so

ſo infinite other of that kinde; or elſe in the French; in which tongue the Reports of forepaſſed Caſes are publiſhed unto the uſe of poſterity, and wherewith the ſaid booke of yeares and tearmes (almoſt in every caſe therein found) are fully furniſhed. So that all, though it ſhall bee needleſſe to make manifeſt that by Example, which of it ſelfe is evident; yet ſtill to purſue the former Method and order hitherunto obſerved, we ſhall eaſily perceive the ſame in this ſhort caſe hereafter expreſſed.

Vn home avoit a luy & ſes heires le nomination del Clerke d'un Eſgliſe a un Abbe, & le Abbe doit preſenter ouſter le Clerke nominate al ordinary, ore le Roy ayant les poſſeſsions del Abbey ad preſent ſon Clerke al dit Eſgliſe eſtant voide ſans aſcun nomination. Et le opinion del Court fut, que le party que averoit le nomination, avera Quare impedit vers le Incumbent tantum, ſans aſcun deſte noſme Patron: Car le Roy ne poit eſte ſue come diſturber: Tamen fut dit q. le Roy ne poit eſte Inſtrument al aſcun home. Et Shelley dit que il eſt Inſtrument a chacun home: Car per luy chacun Subject ad Iuſtice a luy miniſter.

The Principles, Maximes, Rules, or Grounds expreſſed in plaine words in this caſe, and which are indeede the very reaſon of the Reſolution therein taken are theſe.

1 *Le Roy ne poit eſte ſue Come diſturber.*

2 *Lou le Roy preſent per tort, Quare Impedit ſera port vers L'incumbent ſole ſans aſcun deſte noſme Patrone.*

3 *Le Roy ne poit eſte inſtrument al aſcun home, ſi come ſon ſervant.*

4 *Per le Roy cheſcun ſubject ad Iuſtice a luy miniſter.*

5 *Le Roy eſt inſtrument a chacun home pur miniſter a luy Iuſtice.*

So that the Reaſons of every Reſolution in any booke-Caſe being reduced into ſhort Sentences, Propoſitions or Summarie Concluſions are the Grounds, Rules, and Principles that we do meane and ſpeake of in this place.

Such Summarie Concluſions, Corolaries, Reaſons, Grounds, or Propoſitions therefore as afore declared, are delivered in the bookes of Reports in two manners.

Sometimes without any note or marke that they are Grounds or Rules, but onely as laid downe and diſperſed in the Arguments and Reſolutions as ſhort Reaſons of the opinion or determination there expreſſed; as in the laſt example appeareth.

Sometimes with a note or marke that they are Grounds, or Rules and Maximes, and are expreſly inveſted with ſuch names, as in the entrance of this treatiſe hath appeared. And thus much of the Grounds or Propoſitions expreſſed in the bookes.

Now as touching the ſecond ſort, which are to be collected, and inferred out of the Caſes left reported, we plainly may perceive the notable uſe of ſuch collection, in reading adviſedly the Commentaries of M^r. *Plowden*, or other the beſt bookes

bookes of Reports; or diligently obſerving any notable Argument made at this day in any the Kings Courts in matter of *Demurrer*, where we may not thinke that every caſe cited or alleadged out of the bookes for proofe of the Controverſie, is therefore alleadged becauſe it hath expreſſe matter therein publiſhed in plaine words, and tending to the reſolution of the point in queſtion: but at ſometimes, and that moſt commonly, ſuch proofe is produced upon inference, and yet neverthelefs, ſufficiently pregnant to approve the matter whereunto it is rightly applyed: which inference and application proceedeth wholly upon collected Rules and Axiomes included in the reſolution of thoſe Caſes produced, although the ſame be not expreſly ſpoken or publiſhed therein.

Wherefore notwithſtanding the beſt meanes of the collection of the ſaid Rules, depending only upon Meditation, and reſting wholly upon the ſagacity, wit, induſtry, and judgement of the Student, (becauſe every mans ſeverall conceit is in it ſelfe ſundry) may beſt be referred unto the ſtudent himſelfe: yet neverthelefſe, ſhall it not be amiſſe here to manifeſt ſuch direction therein as may be obſerved with ſome fruit.

1 Firſt, after the caſe read, let us conſider with our ſelves, & meditate in our minds, to what ſeverall purpoſes the ſame caſe may bee applyed, and what matter, or ſeverall matters the reſolution of the ſaid Caſe can confirme. Which when wee have conſidered of, it ſhall be good for our memorie to commit them to writing, in manner,

and

and according to this example following;

33. H. 8. 48. b. n. 1. Dyer. *Fut move ſi Tenant in tayle d'un Manour, a que vilains ſons regardant, en feoft un des vilains d'un acre per cel del Manor, et devy, coment que le Manor diſcend al iſſue in tayle, uncore il ne poit ſeiſer ſon vilain tanque le acre ſoit recover.*

Vpon meditation had of this caſe, what it will prove, theſe Propoſitions or Rules following may eaſily be collected.

1 *Lou home ad forſque un action al principal choſe la il naver benefit del acceſſary, tanque il ad per recovery continue le principal.*

And becauſe here the whole principall is not diſcontinued, but onely one Acre, thereof may be collected,

That

2 *Regardancy ou Apendancy neſt ſolement al tout le Manor, mes chachun acre del demeanes.*

Moreover, becauſe the principall in this Caſe, *viz.* the acre diſcontinued, cannot be recontinued without ſuit to be attempted againſt the Villein, it followeth in Reaſon, that he ſhall not be infranchiſed thereby: Whence alſo this Axiome is to be confirmed or proved, That

3 *Neceſſary ſuite ew vers un villein per le ſignier ne enfranchiſe le villein.*

Hereof hath appeared that although none of theſe Propoſitions be expreſſed in the reſolution of the ſaid Caſe, in the booke wherein the ſame is left reported; yet nevertheleſſe are they neceſſarily implyed in the reſolution of the ſaid Caſe, as before hath beene declared.

But

But if the Caſe ſo read doth conſiſt of many points or ſeverall queſtions ſunderly debated, every of them may likewiſe bee ſunderly and apart conſidered of, according to the manner before ſhewed.

A ſecond meanes, by Inference to collect ſuch Rules and propoſitions as are before declared, is by way of Argument by Syllogiſme: For ſuppoſing the ſaid Caſe to be denyed to be Law which we have read; let us endeavour to draw the immediate reaſons thereof into a Syllogiſme for confirmation of the ſame. So that thereby, foraſmuch as all Rules out of the Law are of two ſorts, that is, either being the Reaſons of the Caſe, or the Caſe contracted ſhortly it ſelfe, by ſuch manner of Argument, the Major, and firſt Propoſition of the ſaid ſyllogiſticall Argument, will bee the generall reaſon of the ſaid Caſe: The Minor or ſecond Propoſition, will be the particular reaſon: and the Concluſion will be the contracted caſe it ſelfe: Which alſo will ſerve as a ſecondarie Rule to determine other Caſes of equall Reaſon called into controverſie. For example herein, wee will take the opinion of *Hulls* in 9. *Hen.* 4. 8. *a.* in the end of a Caſe there argued, where hee holdeth for cleere Law, 2

That

Si un home fait fine pur un treſpas dont il fut endite ſon boache ſera eſtopp a dire que il neſt my culpable, ſil ſoit eint implead apres. 9. H. 4. 8. a.

But becauſe the ſame is denyed in *Hen.* 6. wee endeavouring to prove the ſame by Syllogiſme,

ſhall not onely confirme it, but alſo exemplifie our former ſpeeches.

Major] *Nul ſera permit a denyer ceſt injury pur que il ad fait ſatisfaction, ou ad ſuffer puniſhment.*

Minor] *Mes ceſty que ad fait fine pur un offence ad fait aſcun ſatisfaction & in ceo ad eſte puny.*

Concluſio] *Il q. ad fait un fine pur une treſpas on auter offence ſera eſtopp a ceo denier apres.*

Every of theſe propoſitions be eſt-ſoones confirmed not onely with the Caſe before ſpoken (for as they doe prove the Caſe, being the immediate Reaſons thereof; ſo are they to be proved againe by the Caſe as by their effect) but alſo with ſundry other Authorites found in the bookes of like effect.

3 A third obſervation of Propoſitions and Axiomes may bee drawne from the conſideration of the Titleing words, or words which doe yeeld matter of effect; whereof in the caſe laſt remembred are ſuch as doe follow; namely,

Fyne, Eſtoppel, Enditement, Non culpable, Party, &c.

And herein is to be meditated and conſidered what Rules may be derived and collected out of the ſaid caſes, and be referred to every of the ſayd Titles, as namely,

Vnder Fines.

1 *Fine fait pur un offence prove, ceſty q. fait le fine voluntarunt, deſte culpable del dit offence.*

2 *Fine fait per un offence cauſera ceſty q. fait le offence q. il ne ceo denier a apres.*

Vnder

Vnder Enditement, theſe.

SI home ſoit convince, d'un offence ſur un Enditement, q̄, eſt al ſute le Roy, il ne deniera le dit offence, ſil ſoit apres de ceo implede al ſute del Party.

Vnder Eſtoppel, theſe.

HOme ſera eſtopp per matter de Implication q̄, imply le contrary de ſon diſant de Record.

Vnder Non Culpable, theſe.

NOn Culpable ne ſera plede per aſcun lou per implication il ad confeſs le cauſe del action.

Vnder Party, theſe.

SI offence ſoit commit cy bien al Roy que come al Party condemnation al ſute d'un d'eux, aydera l'auter in ſon ſute.

A fourth manner of obſervation is to referre unto every Ground or Rule ſo collected, a Rule, more generall, ſo proceeding from the ſpeciall Rule unto the generall Reaſon, and from that generall Reaſon unto a more generall: As out of the ſayd firſt Caſe may bee drawne this generall Rule. 4

Home ne ſera permit a denier ceo que devant il ad confeſs per implication de Record. 9. H. 4. 8. a

Vnder which Ground not onely the first proposed Case of *9. Hen.* 4. 8. *a.* may bee comprehended; and divers others of like effect and purpose, and which doe concurre under the said Generall Rule; As for example.

Stamf. 155. *a* *cap.* 62. *Stamf.* 98. *b.* 22. *E.* 4. 39 *b*

He which is arraigned, after he hath pleaded either in Barre or in Abatement of the Appeale wheron he was arraigned, may plead over *not guilty* to the felony: Except the Bar or Plea do comprehend such matter as doth acknowledge the felony; as a Release or pardon. But if he doe plead any such Plea or Barre, *viz.* Release, or Pardon in in any Appeale or Enditement, he cannot plead over *Not guilty* to the Felony, because thereby he confesseth the Felony by implication.

11. *H.* 4. 69. *a* *Culpepper.*

If in a Præcipe, the Tenant say that he is Leassee for life, and pray in ayde, the demandant saith he hath fee, which the Tenant denyeth not, and therefore he is owted of the ayde: If after he will say he is Tenant for tearme of life, and vouch, hee shall not be thereunto received.

These Cases with many other may bee comprehended under the generality of the last specified Rule, and are one in Reason, not under one immediate Reason, but under this Reason, *viz.* *Home ne serra admitt a contradize ceo q̃. il ad confess de Record.*

Moreover there is another Case, one in effect of Reason with the former proposed Case, which because it is nevertheless in circumstance more generall, therefore it cannot bee comprehended under the last specified Rule, as namely.

If a man bee indicted of Travers, and thereupon be found guilty by verdict at the ſuite of the King; If after, the party againſt whom the Travers was committed, bring an action for the ſame Travers; the other ſhall not pleade *Not guiltie* thereunto. 7.H.4.35.b.

In the former Grounds, and Caſes thereupon, the partie was concluded by an implyed confeſſion; but in this laſt Caſe, he is convinced by an open tryall or verdict. And whoſoever will comprehend both this and the former Caſes under one Ground or Rule, muſt make the ſame more generall then the former, in this manner.

Home ne ſerra permit a denier tiel offence de que il poit eſte convince per matter de Record.

And foraſmuch as a man may be convinced of an offence as well by confeſſion, as by verdict; and that as well by implicature confeſſion, as by expreſſe confeſſion: Therefore every of the ſaid former Caſes may bee concluded and comprehended under the ampleneſſe of this laſt remembred Ground.

A ſpeciall Ground may be reduced unto a rule or Propoſition generall, by ſeeking the Genus or generall Notion of every Titeling word found in the ſaid ſpeciall Ground, As for example, the ſaid Propoſition before remembred, and which hath beene exemplified with Caſes, was this.

Home ne ſerra permit a denier ceo q̃ devant il ad Confeſs per implication de Record.

Vpon the word (*denier*) it may be drawne more generall, thus;

Home ne ſera permit de contrary ſon act demeſne que devant il ad conuz.

A more generall Reaſon whereof may againe be yeelded, thus.

Seroit inconvenient que le ley alloweroit a dize, & a dedize une meſme choſe de Record.

Vpon the word (*Confeſsion*) theſe Reaſons alſo may bee aſſigned more generall than that firſt ground.

Confeſsion de un eſt le plus pregnant proofe que poit eſte encounter luy.

A reaſon hereof: For, *Le Confeſsion de chacun que concerne luy meſme ſera intend vray.* For,

Nul conuoit le offence meliour que ceſty que ad ceo commit & perpetrat.

Vpon the word (*Implication*) theſe generall Rules may be propoſed.

Confeſsion per Implication eſt cy fort encounter le Party come Confeſsion expreſſ. For

Pregnant Implication eſt equivalent al matter expreſſ.

Vpon the word (*Record*) ſomewhat likewiſe may be ſaid of like effect; *viz.* thus;

Matter de Record que eſt grounded ſur le act del Party meſme luy iſsint liera que il ne contra dira ceo apres. For,

Le credit d'un Iudicial act ne ſera impeach per aſcun que eſt privy a ceo, For,

Matter de Record eſt plus hault teſtimony in ley.

Vnder

Vnder the word (*Fine*) there was mentioned this Ground or Rule.

Fine que eſt fait pur un offence prove home culpable del offence.

Here hence theſe Propoſitions being more generall, may be derived.

Nul per Common preſumption voit faire voluntary fine pur le offence de quel il neſt culpable.

A reaſon whereof may be thus.

Pœna culpam implicat. And *Le Conſequent importa ſon Principal.*

Hereof you ſee what abundance of Rules and Propoſitions one Caſe containeth; and that we may deſcend from the particular caſe, to the ſpeciall Reaſon, from that to a more generall, untill we finde out the very primarie ground of naturall reaſon, from whence all the other are derived.

Herein this Caution is to bee conſidered and had in minde, that in collection of Grounds and Principles out of any propoſed Caſe, the ſame may be native, & alwaies appliable & reduceable to the immediate Reaſon of the ſaid Caſe, ſo that in any occaſion of Argument, the ſame Caſe may be a pregnant and efficient proofe thereunto.

Furthermore collection of Propoſitions may bee drawne and reduced from all the principall places of Logicall invention.

1 As from the Cauſes unto the Effect.

2 And contrariwiſe from the Effects unto their Cauſes.

3 So likewiſe from the Conſequent unto the Antecedent.

4 And

4 And from the Antecedent to the Consequent.

5 Moreover *a Pari*, as from the Equall or like.

6 *A majori* from the more likely unto that which is lesse probable.

7 And againe, from that which is lesse Likely or Probable to that which is more Probable.

8 Finally, from the Contrary to his Contrary: sith that *Eadem est ratio & proportio Contrariorum.*

THe reasons and causes wherefore these Propositions, Rules, and Axioms (as hath been declared first in manner as aforesaid) are not onely to be considered, observed and collected, but alway to be had, and carefully to bee kept in memorie; and the *end* and *scope* whereto they serve and tend, will manifestly appeare, as well by the observation of the right use of them, and the manifold utilitie and great helpe, which riseth by the daily meditation therein, as likewise by the consideration and amendment of some inconsiderate abuses which have crept into the daily handling of them, both in judiciall places abroad, and in private exercises at home.

The necessary use of them therefore consisteth in two parts.

1 The one serving to the obtaining of the knowledge of the Law.

2 The other in use and practice of the Law learned by these Propositions and Rules, reducing them, as occasion serveth, to publike and private behoose.

The

The first is Speculative.
This last Practique.

As touching the first, the profit hence springing may soone be seene and discovered, if we call to our memory, that no manner facultie whatsoever to be learned by the light of Reason, can consist or be comprehended by the capacity of mans understanding, except (as before also in part hath appeared) it be furnished with certaine Assertions, Precepts, Rules, and Propositions, and the same adorned with these two qualities, *Universalitie* and *Veritie*. And as none may worthily take upon him the name of a Divine, which is ignorant of the Principles of his Science; nor any man may well arrogate the title or name of a Philosopher or Physitian, who knoweth not the severall Rules, whereupon, as upon sundry foundations, the said severall faculties are built and erected; so none may be deemed a Lawyer, or admitted, or can give good advise therein, which knoweth not the Precepts whereon his Art dependeth; or hath not read the determination of former doubts left reported in bookes, being the greatest part of the written Law in this Land; And thence, not collected Conclusions for the decisions of present and future controversies.

Moreover seeing the Law of this Land is wholly Rationall (as hath been said) wherein, as in all other Sciences, the minde of man holdeth and keepeth the former published proceeding, by apprehension and discourse, collecting Primary and Secondary Conclusions and Grounds, it cannot

be otherwiſe, but that the obſervation of theſe Primarie and Secondarie Concluſions, muſt needs be the beſt, moſt approved, profitable and ſpeedie meane, for the attaining of the right, ſound, and infallible knowledge of the ſaid Lawes.

And if there be any way extant, or to be found by mans wiſedome, to purge the Engliſh Lawes, from the great Confuſions, tedious and ſuperfluous iterations, with the which the Reports are infeſted; or quit it of theſe manifold contrarieties, wherewith it is ſo greatly overcharged, ſo that the Coherencie, conſtancie, and conformitie thereof, is almoſt utterly loſt, and not without ſome blemiſh and reproach of our Nation and Common-wealth, in manner cleane aboliſhed; Surely, as to me ſeemeth, there is likelihood by that way and meanes to bring the ſame to paſſe, or by none. For, by Rules and Exceptions, all Sciences are and have beene publiſhed, put down and delivered: out of Rules and Exceptions, a method is framed, by which meanes men may view a perfect plot of the coherence of things: Even as in a large ſpred tree, from the loweſt root to the higheſt branch; from the moſt ample and higheſt Generall, by many degrees of deſcent, as in a Pedigree or Genealogie, to the loweſt ſpeciall and particular; which are combined together as it were in a conſanguinity of blood and concordancie of nature.

And yet therewithall peruſing the particular differences and degrees of diſtinction betweene them,

them, in all the course of humane studies, there is none that doth more commend unto your cogitations the wonderfull force of mans wisedome, then doth this discourse, which treateth of the Principles, Grounds, Rules and Originals of Law and Iustice, being the chaine of humane society, without the which it cannot consist; and which, besides the exceeding pleasure that the consideration therof breedeth in the well-affected mind, is able to bring us speedily to ripenesse and maturitie in that profession. For,

Principium est dimidium totius, saith *Aristotle.*

Short refined Reasons of long perplexed cases, doe, through their soundnesse, satisfie our judgements, through their brevity and shortnesse, wonderfully delight the minde, through their pithinesse, they may bee deemed incomparable treasures, yeelding a great shew of wit, and wonderfully sharpning our understanding, of infinite use, in all humane affaires, containing much worth in few words, no burthen to memory, but once obtained, are ever retained.

Sith all Sciences do tend to Verity (as hath bin before often affirmed) which is the object of the intellectuall part of our minde; And sith Veritie and Truth cannot be obtained or found without due knowledge of the causes; *Tunc enim* (as saith the Philosopher) *unumquodque scire arbitramur, cum ejus causas & Principia cognoscimus.* And not unfitly said the Poet,

Fœlix qui potuit rerum cognoscere causas.

Then must the right and due observatiō of these

and ſuch like principles containing the Cauſes of things, be a direction to conduct and lead us to the knowledge of that faculty and ſcience, whereof they are Principles. For from hence all artificiall Demonſtrations are, and have beene drawne and deduced.

To adhere therfore and wholly to reſpect particular caſes, without any obſervation of the generall Rules and Reaſons, and to charge the memory with infinite ſingularities, is utterly to confound the ſame; a labour of unſpeakable toyle, & wherin we ſhall never free us from confuſion; but engender in our ſelves, that wrong opinion which many have (amiſſe) entertained, that there is nothing certaine in our Lawes.

Finally, if the Law be every mans inheritance borne under the ſame, as notably (beſides our owne Lawes) ſaith the Prince of Oratours, *Tully*, *M.T. Cicero pro Cecinna.* *Major hæreditas venit unicuique noſtrum à jure & legibus, quàm ab ijs à quibus illa bona relicta ſunt. Nam ut perveniat ad nos fundus, teſtamento alicujus fieri poteſt: ut retineamus quod noſtrum factum eſt, ſine jure civili fieri non poteſt.* And all mens inheritance ſhall be certaine both for the private repoſe of the people, and publike good and quiet of the Common-wealth. We muſt needes thinke the Law of this Land full of defect, except we thinke and deeme it to be (as indeed it is) certaine.

Who then can, without the conſideration of theſe univerſall Maximes, Propoſitions, Rules, and Principles, wherein certaintie is alone contained, attaine unto the certaine knowledge thereof?

thereof? for as it hath beene truly publiſhed; *Principiorum eſt unumquodque ſibi ipſi fides*; Inſomuch that *cum negantibus ea, non eſt diſputandum*, 10. *Eliz.* 271. *a. Dyer*, 26.

Hitherto hath beene ſpoken what profit the carefull conſideration and obſervation of Principles, Rules, and Maximes of the Law of this Realme doth give us, and what aſſiſtance we may finde therein toward the ſtudy and ſpeculation of the ſame. It reſteth therefore now, that ſomewhat be ſaid of the commodity which may come to him, that ſhall mannage and practiſe the ſame Lawes, and to what uſe this obſervation therein likewiſe ſerveth.

Two kindes of Arguments are noted by *Morgan*.

Il y ſont deux principall choſes ſur que Arguments poient eſte fait, s. noſtre Maximes, & reaſon, le Mere de touts Leyes, &c. I thinke by the latter of theſe, the uſe of Argumentation upon reaſons drawne from the logicall place of invention, are to be underſtood; as namely, to argue and reaſon in caſes of debate, from the cauſes, effects, parts, conſequents, miſchiefes, and inconveniences, and ſuch like; which aptly may bee called naturall reaſon, becauſe all Art therein obſerved, is but the imitation of nature: which kind or courſe of Argument is much uſed in ancient bookes, when as there were feweſt bookes of reports extant. *Com. Colthurſt.*

But by the former of theſe two ſpecified kindes of Arguments, is meant as manifeſtly appeareth, the helpe that Grounds and Maximes do yeeld in

that kinde. For the understanding therefore of the right use thereof, it behooveth to consider, that the same wholly doth consist in the apt and convenient application of the said Rules, unto such particular cases daily falling in debate, as may bee comprehended under the generality of the same Rules, and may in every respect be rightly reduced therunto; so that the Rule might serve as a well-grounded reason of the matter called in question.

To this effect the Author of the Dialogues betweene the Doctor and Student, after he had at large spoken of the credit and supposed certainty of a Principle or Maxime of the Lawes of this Land, addeth further that such Maximes bee not onely holden for Law, but also other cases like unto them, and all things, that necessarily follow upon the same, are to be reduced to the like Law.

2. A second use of the observation of principles in Argumentation may be this.

We are taught (as saith *Aristotle*) and as likewise hath afore beene remembred, by the electiõ of principles to abound in matter fit for Argumentation. Our propositions may bee framed as parts of Syllogismes, or as antecedent propositions of Enthymemes, by which forme of Arguments, this profit and commodity is reaped, that he which rightly useth the same, in proose or disproose of any proposed matter shall not need to fall into any unnecessay and extravagant matter, or digresse from the point that hee hath in hand. For if the parts of our argument so to bee concluded,

ded, doe consist of Propositions which are Principles in Law, and be in due and expedient manner framed and combined together, the Conclusion, which is the point in question, will follow, either necessarily or probably, according to the truth of the said propositions, for as we have before shewed, that by reducing a Case to a Syllogisme, we might finde some of the principall reasons and propositions, whereupon the verity of the said case, being the conclusion, dependeth; as trying out the cause by the effect: So of the contrary part, to frame the effect by the cause; the same propositions will, as they confirme one case, so likewise establish all other speciall cases, which shall happen to concurre in equall and like reason, or be reducible to, or under, the generalitie of the said proposition.

And although the Lawyer be not tyed to this short course of Argument current in schooles, yet in whatsoever large discourse of Argument, if this forme be respected, though amplified and enlarged with Prosyllogismes, after the manner of Rhetoritians or Orators, it will yeeld the fruit afore remembred. There are in our bookes extant of both, as namely, by *Conisby*, to prove that a man might grant his Lease for yeares without Deed, useth this plaine and expresse Syllogisme; whereof every proposition being a Ground and Principle in the Law, the Conclusion necessarily doth follow. 14.H.7.3.b.

1 *Major*] *Chose que jeo poy prender in lease sans fait poiet passer hors de moy sans fait.*

2 *Minor*]

2 *Minor*] *Et un leaſe de terre pur terme d'anus eſt bon ſans fait.*

3 *Concluſio*] *Ergo per meſme le reaſon il poit paſſer hors del Leſſee, & ceo ſans fait.*

10. H. 7. 13. b Likewiſe a queſtion grew whether the heire or executor were to have a furnace fixed unto the ſoile, or ſuch chattels as were annexed to the freehold after the death of the Teſtator, or no; where the Reporter putteth downe the opinion of *Reede* chiefe Iuſtice, *Fiſher* and *Kingſmill*, that the executors ſhould not have the ſame under the frame of this forme of Syllogiſme; whereof every propoſition is a Rule of Law.

1 *Major*] *Ceux choſes que ne poient eſte forfeit per utlary in perſonall action, ne eſte attache in Aſsiſe ne diſtraine per le ſignior pur Rent, tiels choſes executours naveront.*

2 *Minor*] *Mes un furnace ou table fix ſur la terre, ou poſſes, ou un pale, ou un covering de un lict meriſme, ou bord annex al franktenant, ou houſe & feneſters, & anters tiels ſemblables queux ſont annex al franktenement, & ſont fait, pur un profit del inheritance, ne poient eſte forfeit per utlary, ne attach, ne diſtraine.*

3 *Concluſio*] *Ex conſequenti ſequitur que executours naveront tiels choſes.*

As touching the ſecond ſort of Argument by Syllogiſme, in the Commentaries of *Plowden* the ſame is very frequent and uſuall. And herein to take example out of the firſt caſe, becauſe it firſt commeth to memory; All the ſaid Argument of *Griffith* in the caſe of *Fogoſſa*, may be reduced into this Syllogiſme ſet forth in the entrance thereof.

Major]

Major] *Chascun agreement covient este perfect, plein & compleite.*

Minor] *Et le evidence icy ne prove le agreement deste perfect, ne plain, ne compleit, mes plus tost un communication ou parlance que un agreement.*

The conclusion is suppressed, for that it apparently followeth of the premises, untill the end of the argument; where at last it is expressed in this manner.

Conclusio] *Et isint le agreement est imperfect a doner action pur le subsedy per que le agreement intend per le statute nest accomply.*

The Major Proposition is amplified with this Prosyllogisme.

Car agreement concernant personall choses, est un mutuall assent des parties, & doit este execute ove un recompence, ou autrement doit este cy certaine & sufficient que doit doner actio, ou auter remedy pur recompence, & sil issent nest, donque ne sera dit agreement mes plus tost un nude communication.

And this proposition he prooveth by the cases thereafter by him alleadged.

The Minor proposition of the first Syllogisme is there enlarged, where he further addeth.

Et isint in nostre case entant que est statute de Ann. 1. Regis nunc, cap. 3. &c. untill the end of the case.

The like may bee observed in every good and effectuall argument; but wee stand not upon example.

A third profit may be considered herein: for many times it falleth out, that we perceive a coherence and likenesse betweene divers and sun- 3

dry caſes, which therefore we know are applyable to our purpoſe; and yet nevertheleſſe, except we draw the unity of reaſon ſo found and conſidered in the ſaid caſes, unto a ſhort Sentence, Ground, Rule or propoſition, wherein they may concurre, and doe agree; we ſhall bee driven with long circumlocution and many words, to make manifeſt our meaning in the allegation of the ſame, eſpecially if the caſes doe not concurre and agree in one mediate reaſon or likeneſſe, but are upon ſome conformity further off, to be reſembled each to other. As for example.

1 Hen. 7. 4. b. *Le Roy ne poit arreſt un home de ſuſpition de treaſon ou felony, luy meſme, come un ſubject poit faire, pur ceo que ſi il fait tort in ceo feaſant, le party iſſint injury ne poit aver action envers luy.*

49. Ed. 3. 5. a. 50. Aſſis. p. 1. 9. Eliz. 262. *Si home ſoit in debt a un ſur contract ſans ſpecialty; ſi apres ceſty a que le det eſt due ſoit utlage in action perſonall, le Roy naver ceſt dett pur l'utlary a luy forfeit, pur ceo que donq; le defendant perderoit le benefit del ley gager que il puis aver in ſute de ceo commence vers luy per le Creditour.*

25. Ed. 3. 48. a. b. Com. Walſingh. *Coment que leſtatute de W. 2. cap. 3. done reſceit a ceſty in le reverſion generalment uncore ſi le tenant pur vie ſoit lou le Roy ad le reverſion; & il eſtant implede fait default apres default, le Roy ne ſera receive come common perſon ſeroit. Car, ſur le reſceit, le demandant doit counter vers ceſty que eſt receive, Mes iſſent ne poit aſcun counter vers le Roy, ne luy ſuer, mes per petition; Et pur ceo, ſi le Roy ſeroit reſceive le breve, le demandat abateroit maintenant, & pur ceſt miſchiefe, al demandant le Roy ne ſera reſceive: mes ſon droit ſera ſave per auter meane.*

Theſe

Theſe three caſes greatly do differ both in the circumſtance of matter, and in the immediate reaſons, and yet nevertheleſſe have ſome reſemblãce, and a kinde of conformity and likeneſſe, between them each to other.

1 Firſt they all concerne the King.

2 Secondly the King in every of them is reſtrained from that power or benefit that his ſubject hath. For

1 In the firſt, he cannot arreſt one as his ſubject may.

2 In the ſecond hee ſhall loſe that debt which his ſubject, in whoſe right he claimeth it, ſhould recover.

3 In the third he ſhall not bee received where the ſubject might.

And laſtly, in every of theſe caſes, if the King ſhould bee admitted to doe as a common perſon might, the ſubject in ſuit with him ſhould ſuſtaine great prejudice. For

1 In the firſt hee ſhould not bee permitted to puniſh the injury done to his perſon.

2 In the ſecond hee ſhould loſe the benefit of waging his Law. And

3 In the third and laſt have his action debated without his default.

The likeneſſe of which caſes cannot ſo well be conceived without many words, except wee reduce unto ſome generall Axiome the unity and reſemblance of reaſon found in them. And therefore this propoſition without more might have ſufficed for all.

Where the ſubject by reaſon of ſome Prerogative, that is in the King, ſhould otherwiſe be put to a prejudice; there the King ſhall not be allowed that benefit which every of his ſubjects by Law enjoyeth.

In which generall Axiome or Rule, a generall reaſon of all the ſaid ſeverall Caſes doth equally concurre.

4 By this obſervation wee may reape likewiſe a fourth commodity, after this manner. All the Reports do conſiſt of particular Caſes. Every particular Caſe hath his ſeverall Circumſtance. Circumſtances are ſingular, and hardly retained in memorie. For, true is that ſentence, which *Bracton* hath borrowed out of the Civill Law, *Omnia habere in memoria, & in nullo errare, divinum eſt potius quam humanum.* Wherefore when the Caſe is out of memory, and the circumſtances thereof quite forgot, the Reaſon yet remaineth, and is had in memory. For, *Memoria intellectiva eſt univerſalium, ut eſt ipſemet intellectus.*

Bracton li. 1. cap. 1. §. 3.

It is not the Caſe ruled this way, nor that way, but the reaſon which maketh Law; For, *Non quid ſit intelligere ſufficiat, ſed cur ſit diligentius inquiratur.* So that hee which by obſervation of theſe Grounds & principles, remembreth but the reaſon (as he eaſily may) ſhall ſo ſufficiently reſolve all doubts of like degree, as if he had remembred the expreſſe Caſes from which the ſame reaſon is deduced. Although in argument, I confeſſe, not only the generall reaſons, but likewiſe the ſpeciall Caſes are as proofes produced and alleadged.

M. Th. Gribaldus de ratione ſtudij juris lib. 1. cap. 4.

Laſtly,

Laſtly, ſith the choſen and collected Propoſitions and principles in manner as aforeſaid, for our better uſe behooveth to be cõmitted to writing; we may eaſily without great trouble, by diſpoſing of them orderly, frame a Directory, in manner either of a methodicall Treatiſe, or of an Alphabeticall Table, fit and convenient both for the ſpeedy finding of that we would ſeeke, and the ready having of that we can wiſh for, ſurpaſſing the benefit of any Abridgement heretofore extant. 5

And thus much touching the commodities growing by the conſideration and collection of Principles, Rules, Axiomes, Grounds & Maximes: and of the ſcope and end whereunto they tend in managing of our Lawes, as well for the behoofe of the Student, as for the uſe of the Practiſer. And now remaineth that a few words bee ſayd to forewarne both, of certaine abuſes ordinarily bred herein.

1 The firſt Abuſe is, that neither the Ground often-times produced doth come neere the Reaſon of the Caſe, in queſtion; nor the Caſes alleadged to prove and fortifie that Ground, do directly confirme the ſame. A fault very uſuall in publike exerciſes; and may be redreſſed, if we do call to minde that any caſe alleadged ought not to be wreſted to prove the Rule or Ground alleadged; but the Rule, Ground or Principle ought to be the very immediate or ſecondary reaſon of the Caſes whence it is drawne, and which caſes are brought to confirme the ſame, in ſuch ſort, that all the

Caſes alleadged doe concurre in equality of reaſon, likeneſſe, and proportion; and in full proofe of the Principle ſo produced. And that the groũd or principle bee a reaſon of the queſtion in variance, to ſubvert or confirme the ſame. Wherein alſo let this be weighed, that a few principles cannot ſufficiently ſerve to ſupply al occaſions in that behalfe, but the ſame muſt be drawne and deduced of all Cauſes, Titles, and matters in the Law fit for argument and uſe.

2 A ſecond principall overſight is this. Many to prove their opinion in the controverſie propoſed, frame their reaſon rightly from ſome notable Ground, and knowne principle or Rule, which though it be well applyed, yet not regarding the manifold Exceptions whereunto the ſame Principle is ſubject, they doe ſet it forth ſo generall, that it giveth their adverſary ſome cauſe of challenge and cavill thereunto, by objecting ſome inſtance or caſes upon exception of the ſaid Rule: and thereby doth not only ſeem to enfeeble the ſame, in ſhewing the fallacies thereof; but ſometime in ſhew, weakeneth the whoſe reaſon and argument grounded thereupon.

3 The third abuſe of theſe Principles or Propoſitions, is, in the too much frequenting and often needleſſe uſe of them. For ſometimes the obſcurity of the cauſe, may require ſome other manner of argument, drawn from places of invention, which may content and ſatisfie the minde of the hearers much better. And ſometimes the clearneſſe of the matter it ſelfe, needeth not ſuch preparation

paration of proofe and confirmation of thoſe principles and rules. For then is the moſt and beſt of them, when that both propoſitions and Caſes to confirme the ſame, have great coherence with the queſtion; when both the circumſtance of the Caſe in queſtion, and the cauſe of doubt, doe give occaſion to uſe them; ſo that which thereby is affirmed, may rightly be reducible to the purpoſe.

4 Finally, it ſometimes falleth out to be a fault overmuch to abound in well doing. *Omne nimium vertitur in vitium*, ſaith the Proverbe; for ſundry times it happeneth, that it is very convenient and direct to the matter to make argument upon a well applyed Principle, Rule or Ground, which by men of great learning and reading is ſometimes ſo ſufficiently handled, with ſuch abundance and ample furniture of notable and direct Caſes, that their endeavour herein deſerveth high commendations: yet more convenient were it, that their paines were leſſe. For to what purpoſe behooveth it, to heape Caſe upon Caſe, as it were one on the neck of another, *Pelion* upon *Oſſa*? whereas many probable reaſons, though confirmed with few good Caſes, breed greater contentation to the hearer, by reaſon of the ſeverall proofe made thereby then many Caſes.

FINIS.